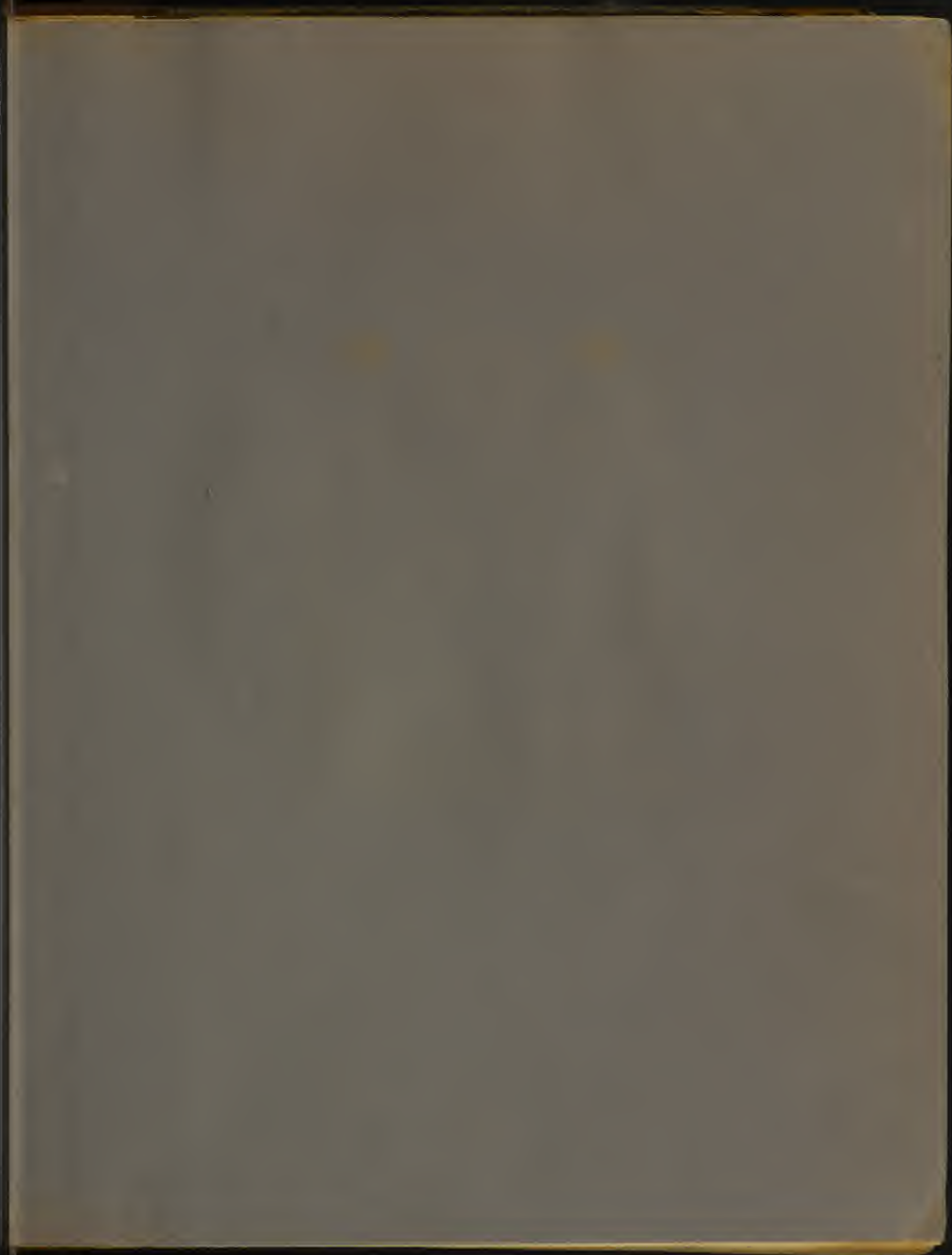
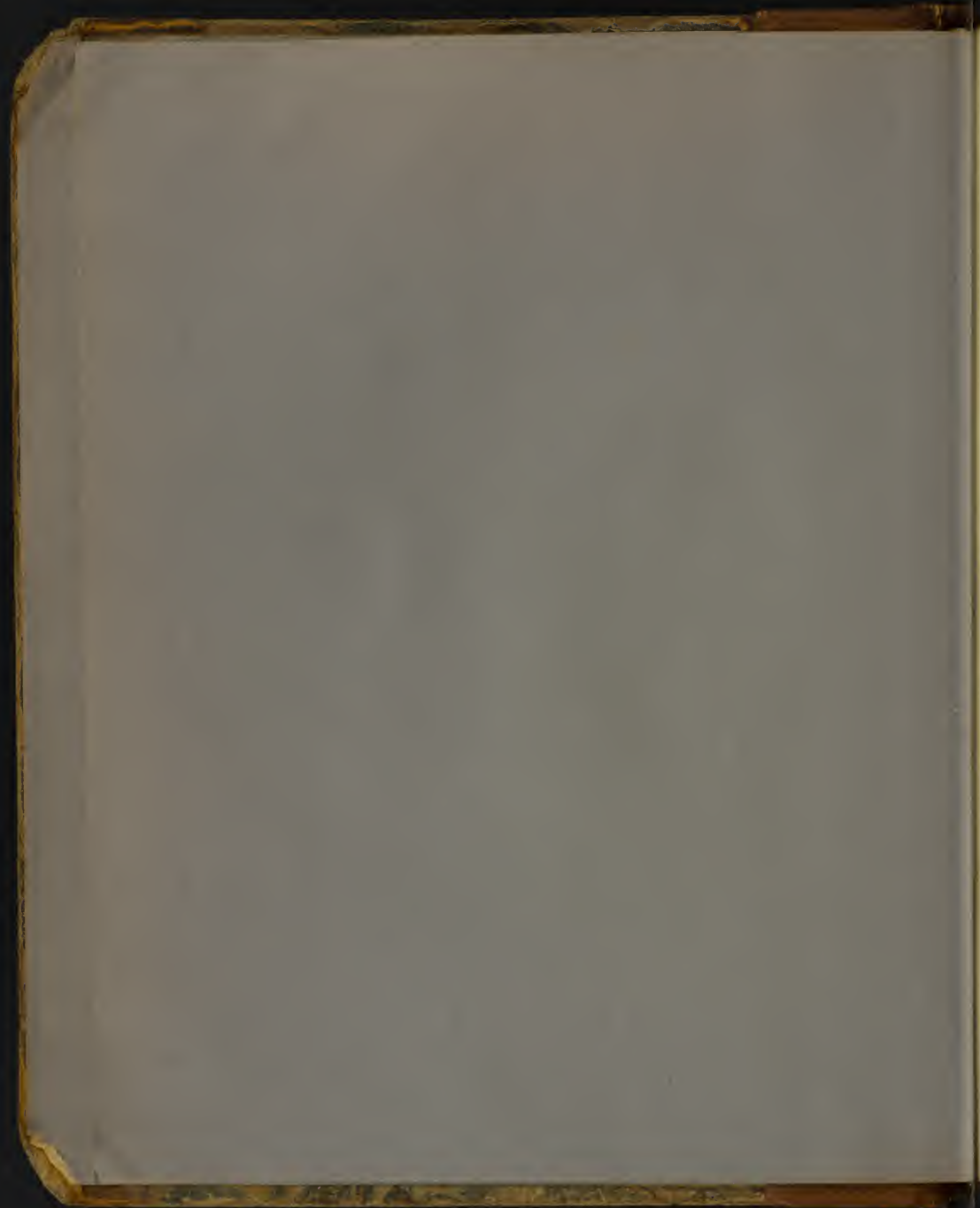


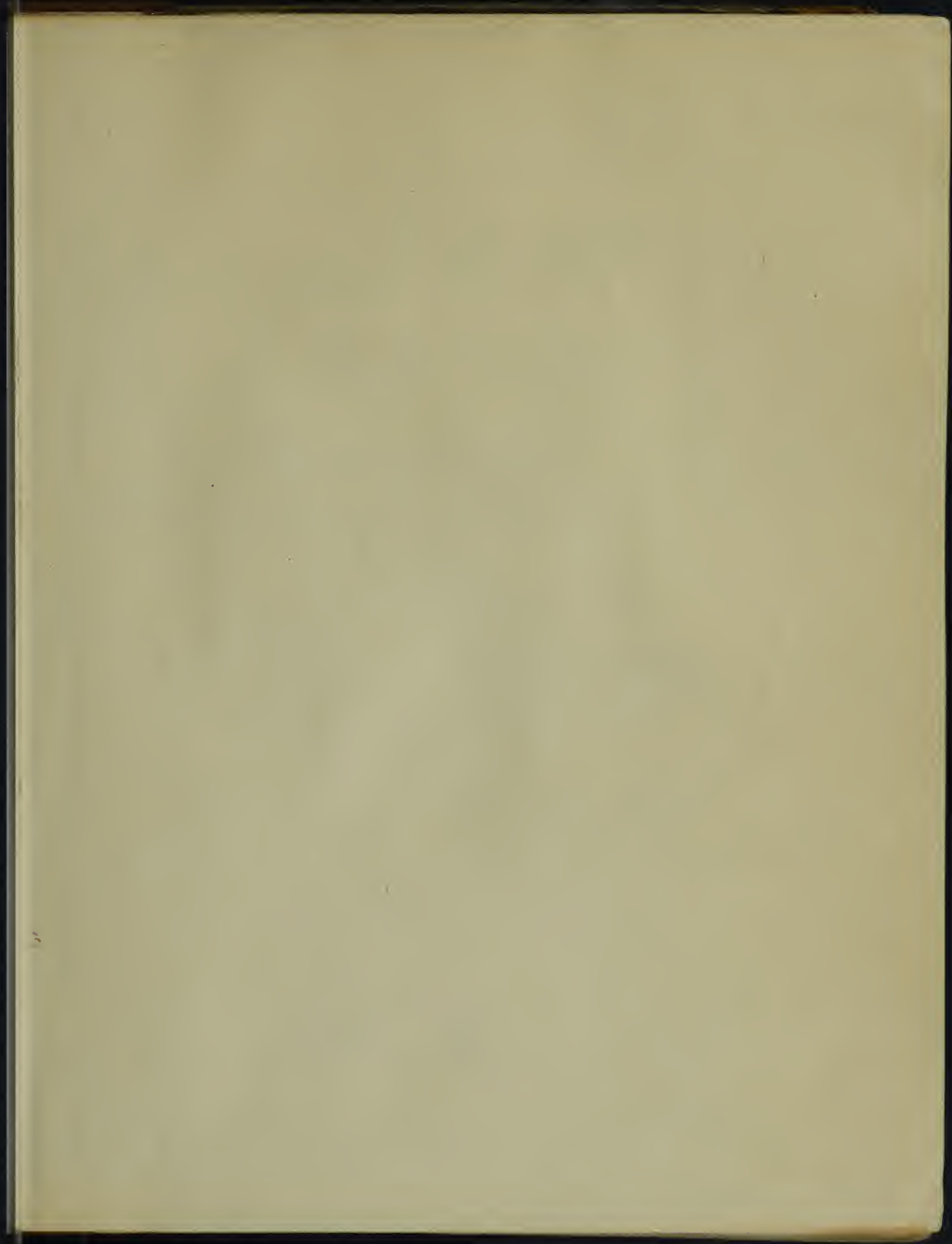
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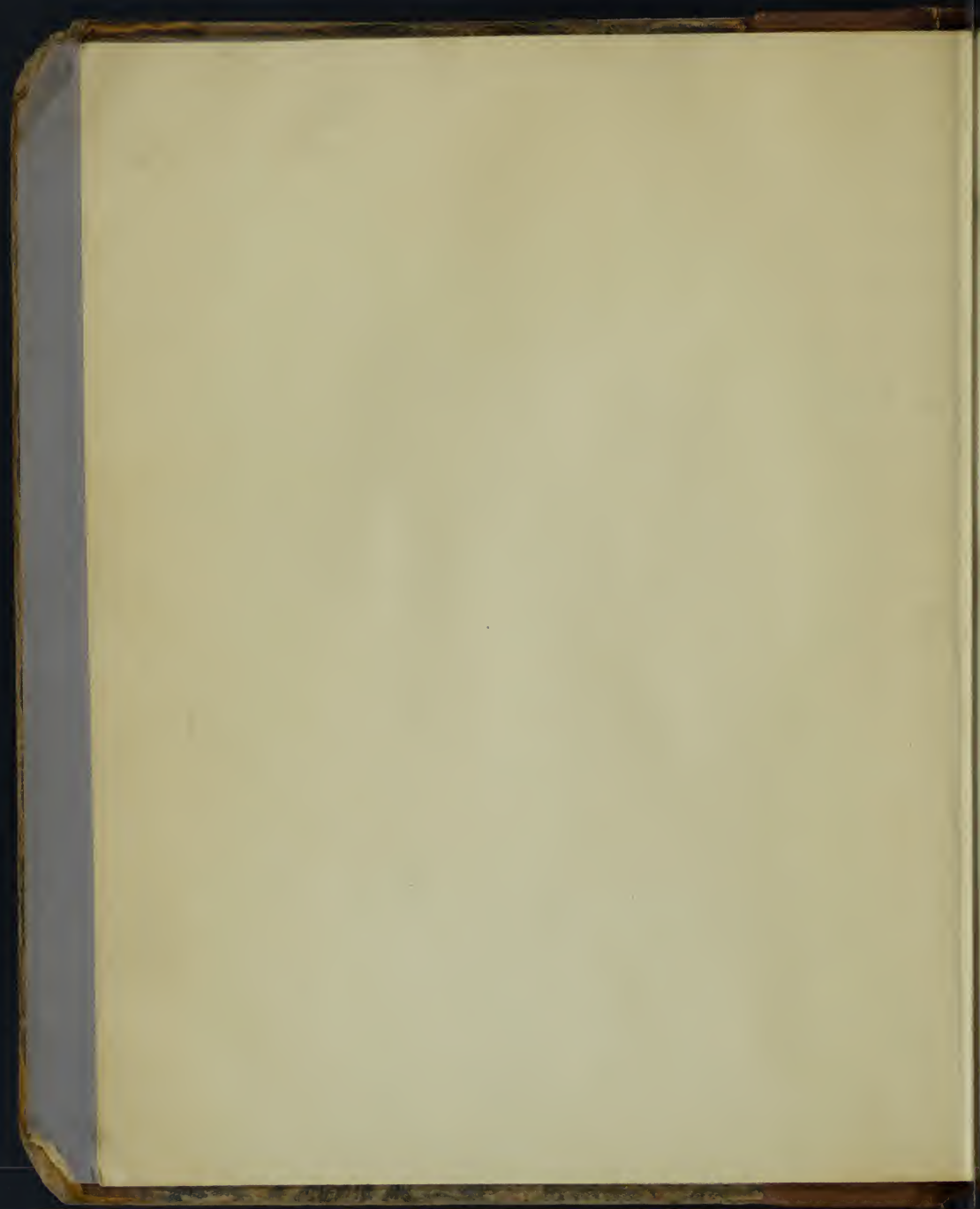


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Lectures
On Law



Delivered in
Litchfield (Conn.)

By
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And
James Gould Esq.

In 1809 & 1810

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TREATISES - STACK ROOM

Lecture 1st Nov. 17/1809
Municipal Law.



Definition "Law" is a rule of action, prescribed by some superior.
"Law of Nature" is the unrevoked law of God or will of God discerned by reason.
"Moral Law" is the revealed law of God.
"Law of Nations" is a general law of nature applied to Nations.

1816 Com. 44

"Municipal Law" is a rule of civil conduct prescribed by the supreme power of a state commanding what is right & prohibiting what is wrong. We will consider this definition in its parts.

1st It is a rule which is imperative. It is contradistinguished from counsel, it is bound advice, counsel & temporary order. Counsel is matter of persuasion Law is matter of injunction. Counsel acts only on the willing; Law on both the willing & the unwilling. It is a rule & so ord. a compact, for it is directed to us, & not proceeding from us. It is a rule because it is permanent uniform & universal. i.e. it is universal so far as it extends. By the term it is not meant that it must exist over a whole state. Particular Customs are Law, they are general & particular as far as they extend. Now the custom of Gavelkind extends generally thro the County of Kent, & is a permanent & universal rule.

2^d It is a rule of civil conduct. In this it is distinguished from natural & moral law; natural law is a rule of moral conduct; moral law is a rule of moral conduct & of faith. Municipal law regards men as members of society; natural & moral law regard them as individuals.

3^d This rule must be prescribed. This implies two things - First that the law be promulged & secondly that it be promulged before it has an effect. Consequently a retroactive rule or order is not Law; a retroactive law is one which has a retrospective operation, & upon general principles is improper; for no sovereign power has a right to make a law which in its operations will be retroactive, because it wants the requisite of being prescribed. There is a difference between a retroactive & an *ex post facto* Law. The former is one which has a retrospective operation; the latter is a penal Law which has a retroactive operation. Of course they cannot make an *ex post facto* Law (i.e.) a penal law which has a retroactive operation. This difference is not generally known. (a)

Ex post facto law is a species of *ex post facto* law.
It is a species of *ex post facto* law.

Lecture I April 18th 1800

We have considered general Customs, we now come to that of Particular Customs.

18th 74
2^d 263

Particular customs are local laws founded on usage. A particular custom differs from a general one, in as much as the latter extend thro' the whole state, the former only thro' a part of it. These particular customs are the remains of provincial customs, out of which King Alfred formed the Common Law, properly so called.

If Plaintiff relies on them, he must lay them in his declaration - If Defendant he must plead them specially. He must shew that his case is within them - The reason is, the Judges are *locus in officio* to take notice of general Customs, but Particular Customs they are not supposed to know judicially - The existence of a particular custom is always considered as a matter of fact & whether it must be specially pleaded, must be mere fact, for the decision of the jury. With regard then to a particular custom, it must be tried by a jury, unless it has been before tried, determined & recorded in the same court. It is then sufficient to produce the record on a second trial.

There is an exception to this rule in the case of Gavelkind & Borough English Customs; they being taken notice of by the Court, as much as general customs are - They have been so long known that their notoriety is as evident as any general custom can be -

Blackstone says the Law merchant is a particular Custom. But this is not true, as evidently appears from his own definition. It has no one incident of a particular Custom. It is universally extended thro' the whole kingdom & is not confined to local limits. The Law merchant is a branch of the Common Law - It need not be specially pleaded, but a particular Custom must be - The Law merchant cannot be tried by a jury ^{seem with particular custom} or proved by witnesses. To be sure skilful merchants are sometimes consulted just as a Dictionary would be to afford the Judge information as to the Law. Indeed the Court may in the same way consult a Lawyer as to other branches of the Law. When a custom is to be pleaded it is necessary to state the provisions of it, but this is never done as to the Law merchant its provisions are not stated. They are in the minds of the judges.

1st May 175
23rd 439, 461
467, 3rd 236
Chitty 13
Salk 125, 2^d 239
1218, 136, 208
298, 4th 208
Chitty 109, 23rd
1216, 181, 208
295, 6th 23

Municipal Law

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1867 7-8

To make a good custom it must be, 1st Immemorial (i.e.) time whereof the memory of man runneth not to the contrary.

2^d It must be continued & uninterrupted; this is to be considered with regard to the right only & not the possession.

3^d It must be peaceably acquiesced in, that is, not immemorably disputed.

4th It must be reasonable, i.e. it must be a rule of Law.

5th It must be Certain: yet, ut certum est quod certum reddi potest. Is not good if to the mischief of another blood.

6th Compulsory. A custom that

7th Customs must be consistent with each other. One custom cannot be set up in opposition to another. Customs in derogation of the Common Law are to be considered strictly, that is, they never extend to include what is not within the letter of the Law. Thus by the custom of Gavelkind an infant may by feoffment alien his Land in fee simple, yet an infant shall not be permitted to make a lease for years. In England all special customs submit to the King's prerogative so if he purchases Gavelkind land, they will descend according to the Com. Law.

3- Certain particular Laws; as civil & common (i.e.)

civil & ecclesiastical Laws of the Roman Empire. These particular Laws are binding by adoption only. This adoption may be by immemorial usage in Courts of Law & by acts of Parliament. The common Law & Statute Law of England, so far as they are binding in our Courts of Justice, derive their binding power from a similar adoption. They are prima facie binding in all cases; our Courts therefore are not now at liberty to reject the common Law of England, except it is unjust, absurd, or inapplicable to our circumstances. In general, all the peculiarities growing out of their monarchical form of government are to be rejected. It is prima facie binding, because it has been used here; our citizens have considered it as the rule of their civil conduct & that they were to be governed by it. It has been questioned whether the Common Law could exist in this Country independent of & distinct from the Common Law of England. I think this is plain that whenever the Common Law is inapplicable to particular cases, we must have a common Law of our own to reach those cases, & wherever the Common Law of England is unjust, absurd, or inapplicable we have a right to a Common Law of our own. In objection to this, we have no immemorial usage; this Country was not in existence as an independent state at the time of the accession of Richard 1st. Consequently every custom will fall within the time of legal memory. Answer. If we adopt this rule we should abolish it according to the reason of it. A custom three hundred years ago, why then may we

1867 79-80.

Week. Bl. 41. 29.

Municipal Law

not say a custom here 80 years old is good. But the objection is illegitimate & futile, no civilized State can exist without a customary Law of its own. Now to say it must have a customary Law of a foreign State imposed upon it, is to say the State is not a sovereign one.

Lecture 3^d

^{2nd} Leges scriptae, written Laws consist of legislative acts, said to be written, because originally set down in writing. It is supposed by Jurists that some parts of the common Law were derived from the ancient English statute. It is said this written Law is binding upon us as far as the common Law is. Colonists who on emigrating from an independent State carry so much of the common Law as was then extant, with them as their birth right.

The Statute Law is then Trinica Law our Law, in the same manner as is the common Law. We often practice upon the ancient English Statute Law without ever enquiring what it is of any binding force. Therefore I say the Judges of our Courts are at liberty to consider the ancient Statute Law of England as our Law in any case which comes before them, unless the statutes of our own Country are opposed to them. The English Statute of frauds & perjuries does not bind the Island of Barbadoes, because it was made after the Island was settled. We adopt the reason of their Statutes.

All statutes are either public or general, private or special. A public statute is one which regards the interests of the whole community. A private statute is one which regards particular persons or private concerns only. The application of this distinction is not very obvious. Most public statutes do not immediately regard the whole community. Our penal statutes are ~~not~~ most always public statutes. But many statutes which relate to particular classes or bodies of men are public statutes. The rule as laid down in the Books to determine whether a statute is public or private is this: If the class to whom the statute particularly relates amounts to a genus it is a public statute; & species if it relates only to a species or individual. This rule requires explanation: When the class of persons is capable of being divided into distinct classes or species, it is then a general or public statute. When it is capable of division only to individuals, it is a private or special statute. Thus a Law respecting mechanics is a general statute, because it may be divided into several species. But one respecting Taylors is a private statute. One respecting all men capable of serving process is a general statute, one respecting Constables is a private statute. But when it is doubtful whether public or private it is always best to plead it specially it can do no harm. A statute respecting the King is a public one: So a statute respecting an individual in a public capacity is a public one as the Secretary of State. A statute giving a forfeiture to the King & by analogy to the community is a public statute, altho it operates only upon an individual, a species of persons. Any statute which concerns the public revenue is a public statute, for its provisions are calculated for the good of the community.

These can be no objection if you are these former on Statute. For the most will be done in such cases as in action within 10 years, & in continuing a statute. But the same is not the case in all cases. The Statute Law is not binding upon the Colonists who on emigrating from an independent State carry so much of the common Law as was then extant, with them as their birth right.

1 Bl. 106
2 Bl. 106
Boull. Dec. 32
Luch. Bl. 386-93

healy 29

1 Bl. 55

19 Vin. 496
2 Boull. 154
2d Bl. 120. 381

4 Bl. 77. No 28 138
Rob 227

Stu. 429. 106
57 Plow. 65
12 Mac. 249

Municipal Law.

156. 55- Statutes are again divided into those declaratory of the Common Law, & those remedial of some parts of it, not an defective. The former declares that the Common Law is & always has been. The latter always introduces some new law or some new rule, & this may be done by supplying some deficiency or abridging some superfluity.

Again all Statutes are either penal or beneficial remedial or as said by some writers on this subject remedial.

A penal Statute is one which inflicts a penalty or punishment of any kind. Penalty in its most general sense signifies the same as punishment. In its limited or restricted sense it means a pecuniary fine or imposition. Statutes not inflicting any kind of punishment are beneficial Statutes according to Lord Coke -

Co. 414. 15
4 Dec 450. 10th 200
2 Dec 125
75 Dec 259. 360 74

Statutes giving Costs in England are supposed to be penal because Costs were not known at Common Law. They originated in the sixth year of the reign of Edward the first by Statute of Gloucester. They are a substitute for what was formerly considered as penal & amercements, & therefore they are said to be penal.

1 Dec 511. 2 Dec
285. 10th 205
10th 119. 4th 7

An action brought by an individual on a penal statute to recover the penalty in his own name is a civil action. The Law is penal, but the action is civil. This distinction is important, because the method of proceeding in a criminal prosecution & a civil action are wholly different. This is a civil action because it is a suit between A & B for money. It is a civil action in its form & nature & is a Common Law process & always sounds in bond.

Co. 382.
1 Dec 125. 10th
75 Dec 740 327

A Quaker cannot testify in a criminal suit, as in a civil action. Pleadings are not amendable as in a civil action.

The jurisdiction of our Courts in civil causes is very different from what is in criminal ones - hence arise doubts of the amendability of the pleadings.

All Statutes are either affirmative or negative; this distinction is of no consequence, except to aid in the rules of construction. By the former is meant, one couched in affirmative terms; by the latter one couched in negative terms.

156. 89. 2 Dec
200-

In England every statute commences its operation from the first day of the session of parliament in which it is enacted, unless some other time is fixed upon - It is now very usual to specify some day in which they shall commence & when this is done they are in fact retroactive, tho' not in judgement of law, because the whole session is considered as one day - If then two statutes were enacted at the same session of parliament referring to each other, neither can claim priority - each repeals the other in proportion to their urgency. It is thought the last would prevail over the other.

Nov. 11. 222. 200.
1 Dec 371. 112. 310.

4 Dec. 136. 138. 10th
22. 19 Dec 320
6 Dec. 287-

Municipal Law.

This rule has been exploded in Connecticut. This Court have recognized as a rule that the whole community ought to have the means of knowing a Law before it shall affect their rights. It does not go into operation until after the rising of the assembly & a reasonable time afterwards. — This time now determined by Statute.

Lecture 4th

Parson 370.

Construction of Statute Law — In the construction of Statute Law several rules & distinctions are to be observed. To construe a Statute is to discover the intent & meaning of the Law Maker. And the object of all rules relative to the construction of statutes is to assist the mind in finding this true intent and meaning of the Law Maker —

In the construction then of all & more especially of beneficial Statutes, three things are to be considered — 1st The old Law, 2^{dly} The mischief & 3^{dly} The Remedy —

1 Bl. 87.

3 Co. 728

The making a new Law when there is an old one on the same subject supposes some defect in the old one —

In the first place then, you are to seek what the old Law was at the time of making the new act — 2^{dly} what was the mischief existing under the old Law, & 3^{dly} what was the remedy intended in the enactment of the new. Ex. gr. Suppose a statute made void all leases by ecclesiastical bodies for longer term than 21 years — Now the mischief was that they let long & unreasonable leases — to the impoverishment of their successors, accordingly it was decided that a lease for the life of the Bishop, tho it should last for more than 21 years was not within the statute.

With regard to penal Statutes, it is a settled rule that they are to be construed strictly (i.e.) according to the letter or literal meaning — as laid down in the Books this is incorrect. It should be thus "they are to be construed strictly as against the person to be affected by them, & equitably for him. The consequence of this rule is, that you can never depart from the literal meaning of a Statute, to bring the subject within it, but you may consult the reason of it to bring him without it. Consequently no person can be punished under a penal statute, unless he is within the letter & spirit of it —

1 Bl. 88. 12.

Black Cl. 107.

232, 310, 387.

8 mod. 65.

It is a general rule that the universality of the expression of a penal Statute, does not include (unless mentioned) those who are exempted from Laws of a similar operation. And in England, if a new Statute is made, it is a rule of construction that, if the person is to be punished corporally, infants or persons under 21 years unless mentioned are exempted. Modern decisions have laid however upon this rule. Lord Mansfield observes that, the plain intention of the Legislature is to be observed in the construction of statutes; & Lord Kenyon says the intention of the Legislature if evident is to be followed in all cases. Judges have however always construed penal Laws reasonably, & it is a general rule that if the intention of a Statute is to be ascertained, it is to be ascertained by the words of the Statute.

Leach 170, 395.

2 R. 3.

Municipal Law.

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1 Hal P.C. 324. 570
085. 2 Hal 349.
Dyer 323. 1180
152. 63.

Plow. 86. Co. Cas.

74.

3 T.R. 733.

14 Bl. 123.

Kells 38. 79. 80.

Mubius - cites in Dalk of their Law as well as of every civilized country

370 + 1 Bous. aff. h. r. c.

"Walker v. Miller"

Second penalty, unless judgement has been given against him for the first, or unless he is convicted of the first crime, before the second offence was committed. This rule of construction has not always been followed.

Another rule is that Penal Laws are strictly Local i.e.

They are strictly confined within the sovereign realm over which the Law extends. No notice of the Penal Law of one State's sovereign can be taken in another. The reason is, the Sovereign is the person offended.

He can only prosecute, & can obtain redress only under the Laws of that sovereign State. One sovereign State cannot punish a man for an offence committed against any other sovereign State. But it is otherwise with

civil suits, & a question is asked whether a Judge of England is to administer the Laws of another Country? Answer: plainly not. but it is a part

of their Law as well as of every civilized country That the Lex Loci in certain

actions, should be the rule of decision - The lex loci applies only to transitory actions

Whose a penalty is frequently occurred by the repetition of

an offence, only one penalty can be sued for at a time - This is settled

in our Courts, but I find nothing of it in the English Books. The reason

is obvious. The intention of the Legislature in repeating the penalty is to give

the offender a motive to discontinue his offences; but he has not the benefit

of this salutary regulation unless he has been convicted once.

Beneficial Statutes are to be construed liberally; i.e. according to

the spirit & equity of them; so they may be restrained or enlarged as to

the letter of them.

But a statute taking away a common Law remedy, is

construed strictly; because it abridges the rights of the citizen (or q. i. p.) the

statute of limitations. The words of an explanatory act are not within the

general rule. They are not to be extended or abridged by construction because

they are presumed to express precisely the intention of the Legislature. Any

Explanatory statute is itself a matter of construction, & if you could

construe this you might construe in in finitum.

Where a statute is partly penal & partly remedial, the

distinction between them is regularly kept up, as to the respective parts,

according to the foregoing rules. So the statutes against frauds are to be con-

strued strictly against the offenders, liberally against the offence (i.e. "to set

aside the fraudulent contract. Different parts of a statute are to be construed

if possible so that the whole may stand together. This applies to contracts, deeds,

wills, or executory agreements as well as to contracts. Effect is to be given to the

whole, if possible, & when not, if there be a saving or qualification totally repugnant to the

whole of the statute, it is void, as if that void part of the law saving the right of a

the saving in void.

1 Cal. 7. 174. 89.

Municipal Law.

Lecture 5th

If two different Statutes ~~are~~ repugnant to each other are made on the same subject, the latter repeals the former; for "Leges posteriores priores contrarias abrogant"

When the common Law & Statute Law differ from each other the former always give place to the latter, on two grounds - first, the Statute is a denial of the common Law an abrogation of its principle: 32nd on the same ground that a later Statute abrogates a former one. & that if the latter part of a Statute is irreconcilably opposed to the former part of it, the latter abrogates the former as far as the repugnancy extends -

Every Statute is in its nature repealable - If it were not so, the consequence would be that the Common Law would so far bind the Legislature, that they could not abrogate any part of it a clause then in a Statute enacting that it shall never be repealed is strictly void. It is abridging the power of a succeeding Legislature - & generally all acts in derogation of a subsequent Legislature are void -

The Law never favours the repeal of a Statute on any part of one by implication. Altho' it often does thus repeal it, as in the case of two inconsistent clauses in the same Statute.

It is said in our Books that an affirmative Statute does not abrogate the Common Law. I see no reason in this rule nor do I believe it is correct - It does abrogate the Common Law, if inconsistent with it - Suppose the Com. Law says the Def^t shall have 6 days notice, & a Statute says he shall have 12 days - The Statute here evidently repeals the Com. Law.

A Statute is called cumulative when that & the Com. Law concern & the party may have his remedy under either. Again - It is said that an affirmative Statute does not repeal an affirmative Statute, It is laid down in Shower thus "It is said to hold only, where there was an antecedent remedy at Com. Law & that an affirmative Statute concerning any thing which was not at Com. Law implies a negative of all ^{other} things" This is very blind, but in the nature of things an affirmative Statute can repeal an affirmative Statute. The true question is whether the two Statutes are inconsistent with each other. The great cardinal rule is to seek the intention of the Legislature & then you find what the Law is - These rules do not apply where there is an express Clause of repeal.

In penal Statutes of a higher or lower degree of punishment is inflicted for any given offence than was implied by

11 Co. 63. 116. 117.

6 Mod. 287. 301.

111. 115. 116. 119.

11 Co. 63. 10. 116. 117.

1 Roll. 11. 28. 4. 2. 11.

43. 116. 44. 4. 116. 117.

638.

Co. Litt. 111. 115.

2 Inst. 201. 2. 116. 117.

302. 3052.

2 Show. 30.

Lock. 62. 132.

4 Bac. 654.

Municipal Law

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an older statute, the older statute is repealed thereby - If a penal statute is made inflicting a less punishment than the Common Law inflicts, the Com Law is thereby repealed. *See 26. 26. Obs.* This is not true if the statute inflicts a higher punishment & the party 206. 10 mod 237 may be prosecuted either at the Common Law or under the statute.

When a repealing statute is itself repealed, the first statute is *ipso facto* revived - It is an implied declaration that it shall revive. And if a statute is repealed by two different statutes, one of which latter is repealed, the remaining one remains unrepealed by the former one - So a revival of a repealed statute abrogates the repealing one.

All acts done under a repealed statute before it is repealed are good in Law - It is laid down in *Jenkins* that if the repealed statute is *Link. 239* - declares null & void "all acts done under it are not good in Law, & 4 Bar 538 - the statute is no justification. This is a monstrous principle - If a man to be punished for obeying a Law which he was bound to obey."

When one statute is repealed expressly by authority which makes different provisions on the same subject to continue for a limited time, the former do not revive at the expiration of the latter unless so expressed by the legislation - 3 East 205 -

It is a general rule that a statute cannot have a retroactive operation. Hence, if a statute after having been violated & before judge 1 Hawk C. 169. West 59. 1 Bla. R. 451 - made against the offender, is repealed & a new one is made the offender cannot be punished under either. unless a clause is put in, enacting that for all offences committed under the old Law, the offender shall be punished. A remarkable case happened in New York - The reason is when the trial comes on there is no old Law in existence, & under the new Law he cannot be punished for there was no such Law when the offence was committed.

There are certain cases in which statutes must consequently have retroactive operation but they are exceptions, they are not contemplated by the Law. As where the statute has no direct operation upon the thing or act committed. If one covenants to do an act, which the Law afterwards forbids him to do, the contract is annulled. But if one covenants not to do an unlawful act, & a statute afterwards makes it lawful, the contract is not annulled, for the Law never makes contracts for the subject. 1 Bull 188 Fox 6211. 2 R 317. 1352. 3 T. 267. 1 K. 65 -

If a contract declared illegal by statute is made while the statute is in force, a subsequent repeal of that statute will not make the contract good - It is void *ab initio*. This new Law does not make a contract for the parties, which it must do, else there is none. As if a note had been given on unstamped paper, while the stamp act was in force, the repeal of the statute did not make this note good - The complete performance cannot be made without violating a statute then such a fact is to be enforced as is consistent with it. The actual performance of a contract if performed before the repeal of the act may confer a performance as well as may be. I believe the same rule would be followed.

Municipal Law 2

1 Co. Com. 248. Court of Law as in a Court of Equity - the principle is equally recognizing
2d 41. - in both. When the legal limitation is so framed that it cannot be carried
into complete effect this rule will apply in a Court of Law

Lecture 6th

It is said by ancient writers & Judges that a statute contrary to reason & to the
Law of God is void. W. G. thinks this rule altogether indefensible. If the Legislature
intend to make an unjust or wicked Law, the Judges are bound to enforce it.
Any other rule will not answer. Who are to determine what Laws are contrary
to reason or the Law of God? If the Judges have a discretionary power to judge
what Laws are reasonable their power is superior to the legislative power. The
reason of a Law is its expediency. The Judges then are to determine what Laws
are or are not expedient. Thus much is true: Where any of the indirect or collateral
consequences of a Law are clearly absurd or unjust Judges are not bound to give
effect to them, because the presumption is that the Legislature did not foresee their
consequences. But this is only construing a Law according to the reason &
equity of it.

2 Fed. 297. It has been decided that Statute Laws contrary to the written Consti-
tution of the State are void. The Constitution is the Law of the Land, &
the object of it is to set bounds to the Supreme authority. Now this written
Constitution is paramount to all Statute Laws. But no other persons
can determine when these Statute Laws are contrary to the written Consti-
tution but the Judges, who are appointed for the purpose of expounding
& administering Law. It is a general rule, that whenever a Statute enables
a Court to do a matter of justice to a party, it binds the Court to do it in all
cases whatever within the statute. This is the reason why "May" is
construed as "Shall" in a Statute. This rule is not universal as Gov-
M'Kean has decided. The Court must consult the good sense of the Statute.
As the Statute in England says the Court may give Costs, they have always
considered themselves bound to give them.

Whenever a Statute makes a new Law concerning an old offence, & of-
fends a new jurisdiction to have cognizance of it, the courts of ordinary
Criminal jurisdiction are not excluded. For their Courts cannot be excluded by
1 Hawk 89. 960. 118. 2 Bull. Criminal jurisdiction - So if a Statute ordains that particular Crimes shall be
564. 2 Burr. by implication - punished by a certain jurisdiction, this does not oust the Courts of King's
1042. Bench from their jurisdiction.

* & in this case the cause may be removed from inferior courts of Common
Law to the Courts of King's Bench. by

Municipal Law

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But if a statute makes a new offence, & creates a new jurisdiction for the trial of it, the jurisdiction of the ordinary Criminal Courts is excluded - In this case the ordinary Courts of criminal jurisdiction are not ousted of any jurisdiction because they have none over this offence. This is to be understood with certain qualifications. If the offence is created by one distinct substantive clause the ordinary Criminal Courts are not excluded. But if they are incorporated together in the Statute these Courts are excluded.

Where then is an authority affecting the rights of individuals conferred by statute, this authority is strictly construed & pursued. (By authority is meant an agency respecting individual rights; as when Commissioners are appointed to take any body's property, to make a road &c.) because it affects the rights of individuals; but it is a rule that all Statutes in derogation of the rights of individuals are to be strictly construed.

Where a statute enables a majority of a certain body to do certain acts for the whole, & constitutes a certain number a quorum to do their acts, it has been several questions whether a majority of the quorum can bind the whole. In the case of the British Museum it has been decided that they cannot, unless they are a majority of the whole body - for such a power is not necessary to the existence of the society, & they have no power but what is expressly given them or necessarily incident to them.

Another general rule is that an authority conferred by statute on two or more persons is joint & not several, unless expressly mentioned in the statute. So if one dies the authority does not go to the survivor. I believe the rule goes to authorise granted to transact private business - for it is another general rule that if authority of a public nature is granted to several, the act of a majority of the whole number, if the others being present, will bind the whole, unless there be an express provision to the contrary - as to Corporations which are mere creatures of the Law, a majority of the whole present will bind the whole unless express provision to the contrary in the statute creating it. For the Law regards such bodies as mere legal entities, & not as composed of any individuals - hence no fraud is supposed.

In the language of Statute Law there is one word often used which has introduced great confusion viz Void - now that which is Void is ab initio a mere nullity; that which is voidable remains valid until set aside by the Court of Law - The rule of construction in this case is, if the intention of the Legislature cannot be carried into effect without adjudging the word void as a nullity, they will strictly follow it; & on the contrary when this intention can be carried into effect without construing strictly the word void, they will consider it only voidable.

The rules of Construction are generally the same in Equity as at Law - They can very rarely, as different Judges differ in opinion - The only difference between these Courts as to this subject is that the mode of relief for misfeasance of performing the Law are different.

Municipal Law

Pleading Statutes, and the mode of proceeding upon them

To plead a Statute is to state upon the record those facts which bring the case within it. There is no need of mentioning the Statute in the pleading.

3 L.R. 221.

Pleading is to state upon the record those facts which show the sufficiency of the Plaintiff's demands & the defendant's defence. Counting upon a Statute is a distinct thing from pleading it. To Count upon a statute is to refer to the Statute expressly in the pleadings. The Statute must always be pleaded before you count upon it. In Counting upon a statute, the form is "Contrary to the statute in such case, made & provided" or by virtue of the statute in such case provided. To recite a Statute is to quote its contents i.e. to transcribe it. It has become a custom to plead a statute by way of recital. But in general there is no reason in this. The Statute is not the Law. But in pleading we never plead Law. Pleading is legal logic.

Lecture 7th

1861. 8. 10. 70.

1060. 87. 2. 100

87. 10. 10. 236.

It is a general rule that, as to public Statutes the Judges are bound, ^{ex officio} i.e. ex officio to take notice of them ~~without the~~ without their being pleaded. This is the general Law of the Law & Courts. But with respect to private Statutes Courts do not ex officio take notice of them, but at Common Law they must be specially pleaded. In Connecticut a private statute, ^{which} may be given in evidence upon the part of the defendant without specially pleading it under the general issue. This is owing to one of their Statutes, ⁵⁴² regulating pleading, which allows every thing to be given in evidence under the general issue, except some act of the Plaintiff by which he is barred of a recovery.

But here as well as in England it must be pleaded specially or given in evidence. Because the private statute is a mere private document as much as a deed or any other instrument.

1061. 5. 4. 76.

1061. 38.

In England & in Connecticut if an action is founded on a private Statute it must be pleaded upon. A public statute when required to be pleaded need not be recited. Indeed a public statute need never be recited. But private statutes must be recited. By this is not meant that he should recite it verbatim, unless he professes to do it. He may state the substance of it, if he pleases. It is necessary to recite a private statute for the same reason that it is necessary to recite any private instrument.

1061. 245. 238

17. 10. 10. 308

Comp. 12. 74. 10. 92

If an intention to recite a Statute he must do it completely. Minutal. When there is a minutal in a public Statute it is said to be fatal to the party pleading it, even after verdict. The reason is he has undertaken to state the Law, & having done it he shall suffer for it.

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Cap. 132. 136a. He has recited a Law which has no existence. This rule is qualified
 by thus thus - A misrecital of a part not material is not fatal but is
 cured by a verdict - And according to Holt the misrecital of a Statute
 1 P.R. 382. - is not fatal unless the party ties himself up to the Statute as recited - as when
 2 M. Kelly, Ex. 576. he declares "contra formam statuti praedicti" The modern cases notice
 all these distinctions - I do not see why Lord Holt's opinion is not
 the accurate one - The misrecital may be considered as mere surplus
 - age, since enough is stated in the record to entitle him to recover - Yet
 after all I find the first rule more often recognized than any other -

2 M. Kelly 517. But the misrecital of a private Statute does not vitiate the pleadings
 after verdict; nor even on demurrer. The reason is, the Court know
 1 P.R. 382. - nothing of this private Statute, consequently they cannot judicially know
 2 mod 241 - that there has been a misrecital. Part advantage may be taken of
 1 Loe. 356 - this misrecital as 1st By joinder of "nil tibi record" 2^o by a joinder in
 abatement - & 3^o by praying "oyer" of the Statute, transcribing
 it on the record, & then demurring to it. The advantage of a
 misrecital is taken in this case, in the same way as a deed -

When a public Statute is introduced to defeat a specialty
 or legal solemnity, it must be pleaded specifically. In this case it is
 not pleaded for the purpose of informing the Court what the
 Law is, but because the Law holds a specialty in so high estimation
 that it will not allow it ~~not allow it~~ to be defeated, unless the Statute
 appears on the record; & indeed another reason is, (the not peculiar to
 this case) that the Defendant ought not to be surprised. It is necessary in
 cases under the Statute against Usury & gambling Contracts.

In declaring however on a public Statute it is not
 necessary to recite them substantially or literally -

If a Statute is part private & part public the distinction is
 to be kept up; one is recited & pleaded - the other is not.

It is in no case necessary to recite the title of a Statute, or the
proem. Neither of them is any part of the Law.

It has been held that the misrecital of the title of a publ. Stat.
 was not fatal even on demurrer. But a little after a contrary rule was
 held. The former rule W.G. thinks the better one because it is founded
 on principle. The mistake is made in mere surplusage, which does not vitiate.

Cap. 132. 136a.
 376. 522-
 1 P.R. 382.
 2 M. Kelly, Ex. 576.
 2 M. Kelly 517.
 1 P.R. 382.
 2 mod 241
 1 Loe. 356

Holt 723 Salk.
 391. 560 59.
 119.
 4 Co. 76. 2 Roll 766.
 2 mod 57.
 10 Co 57. Holt 227.
 1 Com 230. 3 Co 33

1 P.R. 77. 6 mod 101.

Municipal Law.

4 Co. 76. 8d. 28. Another essential difference between the mode of proceeding upon private & public Statutes is, that when one party pleads a private Statute the other party may plead "not tried record" as it is a mere matter of fact; but in the case of a public Statute this plea can be admitted because it is a mere matter of Law. In England the recital of a Statute when it is necessary must contain its date & place where enacted, otherwise it is ill on demurrer —

16 Co. 231. 4 Bac. 157. 2 And. 246. Co. Jo. 211. — 19 Vin. 507. 2 And. 232. 10 Mod. 474. — East 382. — Co. B. 581. 1 And. 33

In declaring a Statute public, it is a general rule, that you need not count upon it — for the Judges are bound as officers to notice it as an exception to this rule, it is said by Comyns, if there be a conflict at Common Law & Statute both at the same time, & the party wishes to found his claim upon the Statute, he must count upon it, that the other party may know whether he founds his action upon the Statute or upon the Common Law — Bacon holds the contrary opinion — The former Mr. G. considers the better — The judgement in our case is different — the method of proceeding & rule of evidence are different — & consequently it ought to appear on the record what kind of remedy he intends to pursue —

This however I believe is true, his declaration would be considered as a declaration at Common Law unless he counts upon the Statute — it will therefore be necessary to count upon it altho the declaration be good at Common Law — Whenever any one prosecutes on a general Statute, he must count upon the Statute on which he founds his claim — tho it is public — This is a mere positive rule & applies in all cases in which penalties are inflicted & actions on prosecuting to recover or enforce them — If a public Statute gives a new action unknown to the Common Law, it will be necessary to count upon it — This rule has not been followed however in all cases — Trepier on the case was unknown to the Common Law yet Statute of Westminster enacting it was never counted upon —

When a Statute extends an old remedy to a new case, it is not necessary to count upon it, for the action is grounded on the Common Law Statute extending remedy to Equity Adminⁿ for torts done to property of Testator — In actions founded on public Statute, penalty, remedial or beneficial which give no new action but extend the old one, the Statute creates a right, but not a remedy — the Common Law remedy is applicable when the action

19 Vin. 403. 4. 3. 55. 85. —

Lecture 8th

Read. 206
 19 Vin. 505.
 2 East 333
 5 Bac. 656

There are cases in which statutes are merely prohibitory - i.e. inflicting no punishment, but merely prohibiting the thing from being done - & others in which by statute the crime is not prohibited but a penalty is inflicted for a violation of it - in both cases each statute must be counted upon for this reason that one is but part of the Law -

It is a rule in pleading that the same offence may be laid in the same indictment as contrary both to the Common Law & to statute - But it must be done in two Counts. The offence laid in one Count is supposed to be a different offence from the one laid in another Count, tho the act is the same. And unless the Statute is counted upon, the offence is supposed to be at Common Law - & it will never answer to count upon the Common Law - It cannot be laid in one Count, because it would seem as if the person was prosecuted both at Common Law & under the statute for the same offence -

Str. 1066. 4 Bac.
 656. 638 -

If a temporary public statute having expired, is revived or continued by a subsequent one, the statute is required to be counted upon, it is sufficient to count upon the former one; because the Law is contained in the former statute & the latter only extends the continuance of it -

5 R. 162. 8 & 362.
 in 62.) 2 Hawk 25 -

An indictment counting upon a Statute may be supported at Common Law, altho there is no Statute to support it - the words "contra formam statute" may be expunged as mere surplusage, because the offence is a mere offence at Common Law -

If any contract or agreement being good at Common Law without writing, is by statute required, in order to be valid, to be in writing, in declaring upon the contract it is not necessary that it should be averred in the declaration that the contract is in writing for it is sufficient if it appears in evidence - The reason is the Statute has only introduced a new rule of evidence; but has not destroyed the old common Law form of pleading - This rule is well exemplified in the Statute of Frauds & perjuries -

* authority for next clause - one

1 Bac. 75. 4 Bac 555
 12 Mod 540. The King
 450. 3 Burr 1890 -
 2 Root 146. 540. Bull
 279. Gout. 289. -
 * 2 Wils. 376. 6 Co 36.
 43. Eof 265. 307.
 5 Com. Gen. 60. 279. 393.

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vice authorities
assigned on the form
page

But whenever the writing was necessary at Common Law & the validity of the contract, it is indispensably necessary in pleading upon the contract to aver that it is in writing. Because the rule of pleading is a Common Law rule, & therefore the party must aver that this Law has been complied with — as a release of a Bond

And if a Statute makes writing necessary to the validity of a Contract, unknown at Common Law, in pleading that contract, it must be averred that it is in writing. The same reason exists here as in the former case.

It is an universal rule in declaring upon a Statute that exceptions in the enacting clause of the Statute must always be negatived & the failure of negativing is a radical defect, which cannot be cured even by a verdict for they make part of the description of the offence. But those exceptions which occur in a separate substantive clause need not be negatived. As a Statute in Connecticut prohibiting a band of the Sabbath all persons are to be fined a certain sum for doing secular business, except works of necessity & mercy — now in an information under this Statute it must be averred that the acts in question were not acts of necessity or mercy — But in another clause of this Statute, it is said all prosecutions for a breach of this Law must be brought within two months — The information need not state that the acts were committed within two months — This rule is not an arbitrary one, but is founded on this reason that the exceptions in the enacting clause enter into the description of the offence — In the other case it is a mere matter of defence on the part of the Defendant —

If the Off. who has a remedy at Common Law founds his claim upon Statute & cannot support his action under it, he may in the same cause & action resort to his remedy at Common Law, if he can support his case may recover under the Common Law, as he may pursue either remedy — This rule is the same in criminal as in civil causes, though formerly held different respecting criminal causes. And this he may do notwithstanding the complaint is expressly founded on the Statute. The same rule has been settled in Connecticut

2 Blk. Rep. 900. 2 Hunt.
302. 356. 2 Hale 191.
Salt 212. 53 R. 169.
2 Astin v. 493.
Geo. Elin. 231. 307. 697.
5 Co. 99. 2 Hale 71.

Municipal Law

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Salk 45. 76. 36.
2 Burr 805. 834.

It is said, if that which was no offence at Common Law is made so by Statute, and a particular mode of prosecuting upon it, is pointed out by the Statute, that mode only can be followed. But this rule is to be understood with qualifications. It holds true in two cases & two only. First when the particular mode of prosecuting is prescribed in the enacting or prohibitory clause, & secondly where there is no prohibitory clause at all, as if Statute says Whoever does thus & thus shall be punished thus & thus. In both these cases the mode of prosecuting is so interwoven with the creation of the offence that they ought not to be separated. If then a Statute creates a new offence & specifies the mode of prosecuting in a distinct substantive clause, any common Law method of prosecuting may be pursued.

1 Burr 544. 5.
2 Burr 205. 2. Hawk
202. note.
2 Burr 205.

And if that which was prohibited by Statute was before punishable by a common Law mode of procedure, this mode as well as the other may be pursued altho the Statute specifies a particular form, because the Statute is merely cumulative. The common Law method is not to be destroyed by mere implication. This is a case in which the Statute does not create the offence.

1 Burr 544. 5.
2 Burr 205. 2. Hawk
302. note.

If a Statute creates a right or an offence & gives no remedy, for the right nor inflicts ^{any} punishment for the offence the common Law will lend its aid to enforce the right given & punish the offence thus prohibited as a misdemeanor. This rule is necessary as it is very often the case that a Statute is made giving a right or prohibiting an offence without furnishing a remedy or sanction. If then an offence thus created is to be punished, the offender is prosecuted as for a misdemeanor in violating the wholesome regulations of the State. If a civil remedy is to be sought, it is by action on the Statute. The right to be enforced is given by the Statute, the remedy is furnished by the common Law. To obstruct the execution of powers granted by Statute, is an offence punishable at common Law, & the declaration need not in fact it ought not to conclude with a 'contra formam Statuti'.

1 Burr 544.
Dow 425. 10. Co.
75. Co. Ed. 655.
3 Lev 290.

Municipal Law.

Who may prosecute on penal Statutes.

It is a general principle of the Common Law, that a public offence cannot be prosecuted by a private individual in his own right or private capacity. An offence is no injury to an individual as such, it is an injury to the public only, considered as a crime, altho it may be attended with a violation of civil rights, consequently the party injured is the only person who can bring this action. In every case the king is the party injured by any public offence - in general the State, public or community.

In England private persons do prosecute offenders for the king in his name & even by indirect in cases of felony where no part of the penalty belongs to them. The party prosecuting is called the prosecutor or informant. But yet the prosecution is in the king's name & the prosecutor is only the agent for the Crown - In Connecticut there is no such mode of procedure - the general rule is not violated by the mode of proceedings.

But there is a kind of prosecution of a mixed nature, called a qui tam action, or information brought partly in the name of the king & partly in the name of the informant himself - It is so called from the words of the process. "Qui tam pro Domino rege quam seipso".

There is a difference between qui tam actions & qui tam informations. The former is carried on by a civil process - the latter by a criminal process. The former is in the nature of an action & debt. The latter strictly criminal, being attended with a forthwith process. An action by an individual in his own right on a penal statute is a civil suit. Kirby 177. Cowh 382. 4 P. R. 756-758.

Lecture 9th

4 Bl 308 2 Hawk 265 These qui tam actions are brought on some penal statute for the purpose of enforcing some penalty or forfeiture inflicted by the statute. So they are creatures of penal statutes invariably, & not known at Common Law. (yet it seems secus in some cases) —

A popular action is one which is given to any individual who will sue for a penalty inflicted by a penal statute. It is called popular, because it is given to any one who will sue for it. Sometimes the whole penalty is given to the prosecutor & sometimes to him & the King jointly & here to the prosecutor & some Public Treasury — where the whole penalty is given to the prosecutor it is a popular & not a qui tam action.

2 Hawk 265, 10 Bar 37. 1 Com. 229 — But a popular action is not of course a qui tam nor a qui tam a popular action. They are distinct actions, tho often confounded in common parlance. This is evident from the fact that the whole penalty is sometimes given to the prosecutor, sometimes a part of it & sometimes the whole is given to the party aggrieved. — It seems a general rule that when ever an individual receives a civil injury by an act prohibited by

4 Bar. 653. 10 Co. 75^c 2 Inst 53. 74 statute, this statute impliedly gives him a remedy by action. on the case, altho there is no express provision for it. He may ground his action on the statute, tho he has his remedy afforded by Common Law but the injury being prohibited by statute his remedy grows out of it. It seems to be the better opinion that a qui tam action would lie —

6 Mon 268^f — Another general rule is that whenever a statute prohibits or commands a thing for the benefit of an individual he may have an action on the statute for any injury he receives under it, altho the remedy is not expressly given in the statute which is assumed. In this case a qui tam action will lie — Whenever a statute inflicts any penalty for the procuring another of a right & that penalty is not expressly apportioned, the party injured shall have the whole penalty. He shall have

an action on the statute to recover it, *et. q. c.* for not setting out letters.

The principal cases in which *qui tam* actions will lie are, first; If for an offence immediately injurious to the public only, any part or the whole of the penalty is given to him who brings the action, any individual may bring it. So if a sum certain is given to the prosecutor & the whole penalty is given to the king any one may have a *qui tam* action. Yet in this case no individual can sue, unless a part of the penalty or sum certain be given by the statute to him if he prosecutes, because the Public is the only party injured & consequently the only party entitled to redress.

2^d If a statute prohibits an offence immediately injurious to an individual as well as to the public, it is said the party injured may sue for it in a *qui tam* action, altho no penalty or part of a penalty or sum certain, or damages are given to him by the statute, in this case the penalty all goes to the public, but the party may obtain his damages.

A *fortiori* where it does give a part of the penalty, he may sue for it in a *qui tam* action. If a statute expressly gives a penalty to the party aggrieved he may sue without joining the public with him. In general, *qui tam* actions are brought for Forgery, perjury, theft &c.

It is a rule of the Common Law that when a fine is given to the public for an offence, & a civil remedy to the party injured the fine may be inflicted if course on conviction of the defendant in the civil action brought by the party injured. This rule has been once required by our Courts. This is analogous to another principle of the Common Law, that when there has been a breach of the peace & an action brought for Trespass by the party injured after conviction of the Defendant in the Trespass the fine shall be of course inflicted "capiatur pro fine". According to our practice fines is not inflicted unless in such cases the Off in the civil suit moves for it. Vide Commentaries Vol. 336. 7. 1129. 1411. When no form of action is prescribed for the recovery of a Statute penalty, the proper form is Debt.

2 How. 265-
377. 460. 13.
Dyer 95-

1 Bac. 37. note
2 Hawk 373-

12 Ho. 134. Dyer
159. See Jac
134 -

4 Bac. 11. Ark. 636.
2 Bac 506. 5d
191. 193 -

Opina 175 -
Coath. 92 -
2 Lorrin 252 -

Municipal Law

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Exp. Bath 42
2 Levin 252

It has been once determined in Connecticut that an action of Indebitatus assumpsit would lie in this - in the case of usury - Indebit assump. seems proper in England too

10 Co. 65-66
72 R. 536. 3 Bl. 162

If a penalty is given partly to the King & partly to the prosecutor the King himself may prosecute, & then he shall have the whole penalty & then even when the Statute enacts that part of the penalty shall be given to the King part to the prosecutor

3 Bl. 162
2 Hawk 276
Cro. Jac. 480

These qui tam prosecutions are carried on for the purpose of enforcing public justice. Hence a bona fide conviction on a qui tam prosecution by action or information or indictment is a bar to any other action or public prosecution for the same offence - And on the other hand a bona fide acquittal or conviction on a qui tam prosecution by indictment is a good bar to a qui tam action for the same offence, because the crime is atoned for & the individual has suffered the punishment by paying the penalty -

Bro. Col. 261. Holt
209. 1000 Dep. 49
do 134. 3 Bl. 162

And as in civil cases the Law will not allow two causes to be pending for the same offence, so in the case of a qui tam action that is pending, it may be pleaded in abatement for action of an indictment brought at the same time for the same offence.

2 Hawk 275. 3 Bl. 162
1423.

A suit is considered as pending from the time of the purchase of the writ, not merely from the time of the return. In Connecticut from the time of service -

1000 57. 2 Bl. 437
2 Hov. 1169. 3 Bl. 162
1423. 2 Hov. 310
311.

A person claiming a penalty under a penal statute, giving it to any one who will sue for it, has no right in himself to it until he has commenced an action to recover it. In the case of a penal statute the rule is different for the moment his rights are violated he has an interest in the damages to be recovered - But in the case of penal statutes no one can say "the penalty is mine" But by first commencing

3 Inst. 194. Bro. Col.
138. 11 Co. 65.
2 Bl. 437.

an action he acquires a right to the penalty. True it is not consummated, but it is an inchoate right, which is perfected by judgement and this right will exclude all subsequent prosecutions. Indeed such penalties are a kind of hereditas jacens property, that is, liable to become any persons property who first occupies in a certain way - It follows then

Cr. Cl. 480. — If several persons are convicted in a popular action for one
 talk. 182. — given offence, one penalty only is inflicted. But if several
 4 T.R. 809. — are convicted in a public prosecution on a penal statute, then
 Bull. No. 189. — the penalty is inflicted on each. The reason is said to be, the
 Cowp. 610. — first is founded on debt & therefore joint, & the second on a crime
 which is several. The true reason is, in one case they are con-
 sidered as Debtors & therefore joint; in the other they are con-
 sidered as criminals & therefore several.

Cowp. 640. — Several prohibited acts of the same kind when
 committed in continuity amount to but one offence: consequently
 only one penalty can be inflicted — So if a person labours
thru the day on the sabbath, this, only one offence.

talk. 206. — There is an essential difference in the consequences
 1 W. Bl. 10. — of a conviction on a popular action in England & in America
 1 Bar 42. 5th — (Con?) In the former the prosecutor never recovers costs, except —
 + 519 — they are expressly given him by statute — Here if the Plf —
 recovers he always recovers his costs —

But when the penalty is given to the party
 aggrieved he recovers costs in England as well as here —

11111

Private Relations.

Lecture
10th

The objects of the Law are Rights & Wrongs. These rights are divisible into several kinds, as rights of persons & rights of things. The former are again divided into such as are absolute & such as are relative. Relative rights are such as men acquire, by their relation to society, which includes what are usually called the "domestic relations"; & first of

Master & Servant.

A Servant is one who is subject to the personal authority of another. A Master is one who exercises this authority.

To constitute a person a servant in the true sense of the word, it is necessary that the authority here spoken of should be personal. He who is subject to civil authority is not a servant. The authority exercised by the master generally arises from some compact made with the servant or some one who has the command over him.

In Connecticut this is not always true, for here there are six kinds of Servants - First Slaves - secondly Apprentices, Thirdly Menial Servants, Fourthly Day Labourers, Fifthly Agents of any kind, & Sixthly Debtors assigned in service under the Statute Law of the State. The first & last of these kinds are unknown to the Common Law. This only recognises the four remaining ones first specified.

Stat Con. 34

106. 423.

1 Woodson 464

I. Slaves. It has been much doubted whether Slavery has ever been authorised in Connecticut. If legitimate Slavery does exist in Connecticut at all, it must depend upon either Natural Law, Common Law or our own Local Law.

1st Jargue; Natural Law does not allow slavery. If it does, it must arise either from a state of captivity in War or contract or one being born a slave - First It is said Natural Law allows Slavery in case of captivity in War, because as every one has a right to kill his enemy in justifiable war, he certainly has

2 Bn 211. n
vated

a right to take him into captivity. If the premises were allowed the conclusion would perhaps follow. But one enemy has not a right to kill another enemy except thro necessity, which happens in self defence. Now when a man is taken prisoner his captor has no right to kill him, according to the supposition because it is not necessary for his preservation.

Secondly, On principles of natural or general Law can one man become a slave by contract? Every sale requires a *quid pro quo*; but the property of the servant devolves on the sale *ipso facto* on his master. Strict unqualified slavery gives the master a power over the life, the liberty & the property of the servant. But this power can never be given by contract. No man has a right to take away his own life; consequently he can never by contract give this right to another. Again, strict slavery involves the notion of unqualified submission to the will of the master. But no man can make a surrender of his Moral agency to another. — Again, strict slavery implies a complete power over the property of the slave. Now this contract is not mutual, because if there is a stipend toward for the submission, this reward goes immediately to the master. The one may by contract agree to serve another, he cannot by contract agree to become his slave.

Thirdly — Can slavery be created by birth? This supposes a previous state of slavery. Slavery by birth is derivative; but if there is no slavery at first, there can be none which is derivative. On the principles of natural Law then there can be no slavery authorized.

186. 424 —
Vol 666.

2^d Is slavery warranted by the Common Law? Clearly not. It will not suffer any species of private slavery. This affirms, from the fact, that the local laws of any country in favour of slavery

Master and Servant.

1 Book 96
Loft 1. —

cannot be enforced in England & further the moment a foreign slave touches the soil of Great Britain he is secure in his life, liberty, & property & is no more a slave —

Decl. 189 194 204.

2 Bk. 96. Loft 8.

3 Bk. 307 —

There were in England under the feudal system persons who were called villains, but they were not absolute slaves, because the Lord could not kill or wound them — But villinage has ceased in England — It was abolished at the restoration in 1660 by virtue of the Statute of 12th Charles the 2^d at which time there were but two villains in England — a villain was the ancient name for slave, as knave was for servant, as in ancient versions of the Bible, it was "Paul the knave &c —"

3^d Is slavery legalized under our own local laws?

I think this is evident — unless we have no statute expressly authorizing the holding of slaves in the first instance, yet we have statutes counting upon the existence of slavery, & making provisions

Stat. Con. 141. 228.

337. 396. 399.

for slaves co nomine exclusively — These statutes were made by the supreme legislative power & of course slaves

*As per opinion of Justice
with his master a slave & his
a slave to be contented with his
master is, say, with an agreement
we agree to be subject to any master
master here has been an express assent
not to have the master. 1 Bk. 186. 3.*

It has been urged by the opponents of this idea that we have no judicial decision in point — True no slave has brought a habeas corpus to try the question, but the Courts have manifested an opinion that slavery was legalized — They have decided that a slave may be sold, tho they agree that a master cannot maintain trover for his servant, & have determined that a slave may be taken in execution & sold at the foot — a qualified slavery then exists in Connecticut at this moment — true it is not absolute — this was never pretended — It has been determined in Connecticut that when a slave is taken or seduced away, the proper action is the same as it would have been had the person been an apprentice in the master's house — contract over the slave's life. —

In one case in Connecticut. A slave who had a family brought an action against his master for selling him to a man in New York, thus separating him from his family - The court however advised to a compromise. We doubt whether the action would lie -

A slave may hold property & may sue for it by his next friend - He may be a devisee or legatee, or inherit an estate - He cannot take sue, make contracts, for this is forbidden by Statute - But the master cannot take away the property, & if he does an action lies in favour of the slave against his master.

If a slave marries with the consent of his master, he is *ipso facto* immediately emancipated. This point has lately been decided in Pennsylvania - The ground is, he has made a new relation promised with his former one - If he still remains a slave, he cannot assert his rights nor in many cases perform his duties. The master if he consents to the marriage must consent to renounce all those rights & such an inconsistency with those acquired by the servant & by his new relation.

33 A. 356. A minor child is emancipated from his father when he is married. Whenever then any individual in the character of a slave contracts a new relation, the duties of which are inconsistent with his former condition, he is discharged from this former condition.

It is true that a slave cannot be freed from his servitude, by marriage, if done without leave of his master, & this is agreeable to the ancient idea that a wife or female slave is not freed from servitude, by marrying another slave - But if she marries a freeman, she is discharged during coverture, & if she marries her Lord she is forever free -

206 93. 94. - Little. 137. 8. - It has been a question whether (in law) an illegitimate child can become a slave by birth - Uniform usage has decided this point according to the civil law - the offspring followed the condition of the mother, & this law on this subject has been recognised in Connecticut. By the old English law the offspring followed the condition of the father.

Master and Servant.

Stat 399. 462.

A legitimate child cannot be a slave by birth, because it is born in lawful wedlock - at the birth of the child then neither parent can be a slave - Slavery is almost entirely abolished in Connecticut - A statute is made forbidding the importation of slaves & another providing that all children born of slaves after 1st March 1784 & before Augst 1797 shall be free at the age of 25 and after shall be free at the age of twenty one years -

On the principles of the Common Law offenders may be judicially condemned to slavery for crimes - As is the case with those confined to hard labour - This is a qualified civil slavery - They are made slaves to the public, & those who have the management of them are the agents of the public - R 11

Lecture 11th

1st 426.

Apprentices. These constitute the second class of servants. At common Law these are the first. They are so called from the French word "apprendre" to learn - as they are usually bound to their masters for the purpose of being instructed. They are commonly bound to the professors of some mechanical art but not always, as they may be bound to serve in husbandry.

2^d 117 Salt 68

2^d 117 64. 492.

6th Mo. 182

16th 94.

An apprentice can be bound in no other way than by Deed & this at common Law for a parcel contract of apprenticeship is not good at common Law & this is the only instance in which a contract creating a right is not good at common Law by parcel.

8th 374.

And it has lately been decided in England that where a contract of apprenticeship is defective, no other contract can be made out of it as a hiring by the year -

1st 117 57.

2^d 117 57. 1st 117 57.

It has been formerly held that the relation of master & apprentice cannot be created unless the person is retained by the name of apprentice -

3 Bae 546

All other servants, may be retained by force. There is no reason given in the Books for this distinction between apprentices & other servants - but I conclude it must be this. An apprentice is bound to a much stricter kind of service than any other servant. And the master has much more important duties to perform in this case than in any other. & therefore the contract is of so high a nature that it ought not to be proved by force evidence.

1 Bae 426

Minors or Infants, may be bound out as apprentices by their Parents or guardians. In England the children of paupers may be apprenticed out by virtue of several statutes, by the overseers of the Poor with the consent of two Justices, until they arrive at full age. And by these statutes those to whom these poor children are offered as apprentices, are obliged to take them.

In Connecticut there are two statutes that provide that the children of poor parents living idle & misbehaving their time, who are likely to come to want, who are not competently provided for & who have grown rude & stubborn & may be bound out by the selectmen, who are ex officio overseers of the poor, with the advice of the next assistant or justice of the peace, until they arrive at the age of 21, & remain to the age of 18.

All other servants except apprentices are entitled to wages. The wages of menial servants are settled in England by contract of apprentices to husbandry by the Sherrif or Seigniors. & they are all settled by contract.

8 Bae 379

At times an apprentice may by express reservation in the contract have wages - there is nothing illegal in it. Yet the Law will never imply an obligation of the master to pay wages to his apprentice. But it will in the case of menial servants & agents.

3 Bae 285

Now to be so discharged that at a moment's warning for misconduct, i.e. for being absent when wanted helping from home at night with master's permission, & for such case need ever recover any wages due at the time of the discharge.

Master and Servant.

It is enacted by the Statute 5 Eliz. that Minors may bind themselves by indenture of apprenticeship. Yet under this Statute it has been uniformly holden that the minor is not bound to perform this contract. All that is effected by this Statute is, that while the relation does in fact continue all the rights & duties on both parts are enjoyed & performed. If the apprentice continues during the term prescribed by Law, he shall be free of his trade.

But when the father or guardian joins in the indenture he is bound by it. Both usually sign it, & when they do not the minor is not bound, but the father is, both by the Statute & the Common Law. To have no such rule & the rule of the Common Law prevails, therefore a minor cannot bind himself by an indenture.

There are several ways in which an apprentice may be discharged from the service of his Master - as 1st Misuser. The Master in many respects stands in loco parentis hence, greatly abusing the apprentice in his government, or any abuse which renders the life of the servant uncomfortable is good cause for his leaving his service - 2^d He may be discharged by Deed; it is often said in the Books that he cannot be discharged by Deed, but this is meant where the discharge is to be effected by Contract. 3^d by exchanging, delivering up or cancelling the indentures, because the original Contract is by these means virtually destroyed. And Law it has been determined that a Master having discharged the servant by deed could not maintain an action on the covenant against the apprentice's Father. The ground of the decision was that the Master was guilty of a wrong in discharging the apprentice without the Father's knowledge & consent, & in this case the Father might have had an action against the Master. I suppose in strictness he was not discharged & that the Master might afterwards have claimed him & that if he had sued for his not returning, he might have recovered.

See Coe. 179.
448. Coe. 497.
8 mod. 190. 550.
716

Long 501. 518.
8 mod. 190.

1 alk. 518. —
Lok. 1117. —
alk. 68. —
6 mod. 182. —

Hia. 582.

Supra. Whamille
Sub. Count.
12th Cases 159

H. Bl. 574. ~
Dow. 259. 550.
638. 16th 414.

Master and Servant

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^{Under} In Connecticut an apprentice may be discharged by the County Court for the refusal or misconduct of the master. This by virtue of a Statute.

5th Dec 550. 106. 520.

And the same thing may be done in England by the quarter Sessions, or two Justices, or one with a right of appeal to the Sessions but this is done by the Justices only where the consent was made by them. The master may also be discharged by default of the apprentice.

Lecture 12th

12 mod 533. 106. 134.

3 Hott. 519. 128250.

Doug. 69.

It is a rule of the Common Law that a master cannot assign his apprentice. He cannot sell his right or interest in him, so as to bind the apprentice. For the contract is altogether fiduciary. & therefore the interest cannot be assigned. This is founded on the best of reasons; for the Father reposes a confidence in the master whom he has chosen & in him only. Indeed it is a general rule that a personal trust or confidence cannot be assigned. (Secus by Custom of London if apprentice consent) — On this principle it was held that where a submission was made to arbitrators by parties to an indenture, & the arbitrators awarded that the apprentice should be assigned to another in service, the Award was held not to be good. Yet the contract of assignment shall be good as it respects the assignor, because he may make a contract as it respects himself, but not as it respects the apprentice; & the master is liable for a breach of covenant, where there are no executory words used at all.

Stria. 1267.

Wills 96. 106. 683.

Salk 68. Doug 69. —

Holt 134. 5. 8 mod. 236.

12 mod. 446.

But if the person assigned does serve as an apprentice he gains the rights & incurs the duties of an apprentice. By void is meant that it does not bind the apprentice. The master is bound regularly to keep the apprentice under his own care, & not to send him abroad even for the purpose of improvement, unless an agreement is made in the contract, or the nature of the business requires it as if his object is to learn the sea faring business —

1 Ves. 35. 226. 683

2 Str. 1267. —

Upon the same principle it is held that the Executor or Administrator of the master cannot hold the apprentice after his master's death because as the right of holding is not transferable so it is not transmissible, & further, the Executor may not be able to instruct him —

Master and Servant.

1 *Id.* 216. 1 *Rev.* Yet it has been once held that the executor of the master is bound to teach him, or procure some one to teach him. This is in
177. to teach him, or procure some one to teach him. This is in
Contn. Wale put direct opposition to the general rule - & is now denied to be Law
296. 2 *Rev.* 177. 177.

It has been much questioned whether the Executor of a Master is bound to furnish diet, clothing &c for the apprentice during the time for which he is bound. By the current of authorities
1 *Holt* 761. 820. He is - I think these decisions have all been laid on the force of
3 *Salk* 41, but 533. He is - I think these decisions have all been laid on the force of
2 *Rev.* 177. 177. The indenture, which is that "the apprentice shall be furnished with necessaries during the aforesaid term" and this the Judges construe strictly.

It is very frequently the case in England that the master receives a premium for instructing the apprentice. And the courts of Chancery have ordered a restoration of part of the premium when the master died soon after the relation began. This is entirely
1 *Rev.* 460 - however a rule of equity - and they have carried this further, for where
2 *Rev.* 177. 177. there was an express stipulation in the indenture that in the event
1 *Atk* 149. 2 *Rev.* 177. 177. of the master's death a part of the premium should be returned, they decreed
64. a larger portion should be returned, on account of the master's dying soon after the relation commenced - So if the master turns away the apprentice or becomes a bankrupt, part of the premium is to be restored - Bankruptcy is not per se a discharge, but the

debtors will discharge in such cases - and in certain cases where justice of the peace discharge an apprentice they may order the master to refund a part of the premium
1 *Salk* 67 490. Whatever an apprentice earns during his apprenticeship
11 *Mod* 410 - belongs to his master absolutely; who may recover it in any proper action
1 *Rev.* 582. It is not in the power of the apprentice to earn any thing by his labour for himself during his apprenticeship. This is also true of an apprentice
2 *Mod* 415. *Salk* 68. *de facto*. If then the apprentice earns property in possession during
1 *Rev.* 48. 83. - the apprenticeship, the property belongs to the master who may sue for it - So if a debt is created for the labour of the apprentice during
1 *Rev.* 83. 6 *Mod* 69. his apprenticeship, it is a debt due to the master who may sue for & recover it - & this is true tho the labour is performed without the consent of the master & not in the line of his usual business -

1 *Rev.* 582. It is not in the power of the apprentice to earn any thing by his labour for himself during his apprenticeship. This is also true of an apprentice
2 *Mod* 415. *Salk* 68. *de facto*. If then the apprentice earns property in possession during
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1 *Rev.* 83. 6 *Mod* 69. his apprenticeship, it is a debt due to the master who may sue for & recover it - & this is true tho the labour is performed without the consent of the master & not in the line of his usual business -
3 *Rev.* 508. *Rev.* 582.

Master and Servant.

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But I do not find that any of these rules hold in the case of any other servants except Slaves, & they are well known at Common Law. Any other servants wages he cannot recover. His proper remedy is an action on the case against the employer for loss of service, provided the employer knew of the retainer - or as the case may be an action against the servant for a breach of contract, & if he be a minor, against the father or guardian.

The situation of a servant resembles in this respect that of a minor child. The parent is entitled to all his wages during his minority.

In case of these servants, particular hours are generally appointed, for the benefit of the master: & if a servant earns wages out of these hours, the master has no right to them - so a servant may have what he earns late at night.

If however a servant of any kind (spirit) is enticed away from his master service an action will lie against the party enticing - And this rule, it has been held, extends to journeymen who are hired by the day or month - But if the party does not know of the service, or cannot be supposed to have the means of knowing no action will lie against him.

The action which is to be brought by the master is different in different cases. If the servant is taken away by force, an action of trespass with force will lie - If he is enticed away an action on the case is the proper action - Yet in Couper for enticing a man's servant, the action is called Trespass - I think there must be a mistake in this report. Trespass on the case is the proper action.

Under an English statute the apprentice gains a settlement in the place where he resides the last 40 days of his apprenticeship - here we have no such statute; on the contrary it seems settled principle that no apprentice gains a settlement by men resident with his master.

In Connecticut, if a servant wrongfully absconds of 18 years of age, he shall be liable to serve his master till the time of his absence - and under a warrant men may be imprisoned to retake a servant running away from his master.

Master & Servant

Lecture 13th.

1/186. 425-

3rd Menial Servants - By these are meant domestic servants, & are those who are supposed to be at work within the house - "intra mœnia"

3 Bac. 5th Ed. R. 168. 156 451.

Co. L. 42 -

A contract to pay a certain sum per An. in consideration of service to be performed is an entire contract for a year & until a full years service he is not entitled to recover 12th Ed. 3rd Mod. 153. 2nd Ed. 320. 3rd Ventr. 214. Appoint. 14. 8. Sec. in case of cont. hired serv. per. a. Lawrence 6th Ed. 326.

In England, in the case of menial servant, where the time of service is not expressed it is supposed to be one year, & is founded on the presumption that one shall serve & the other maintain him the several seasons of the year - This tho a rule of the Common Law is not the practice here -

By the Statute 3 Eliz. in certain cases a master cannot dismiss his menial servant or the servant leave his masters service, before or at the end of the time agreed upon without three months notice unless by a dispensation from a magistrate - We have no statute here of this kind -

1/186. 426-7-

4th Day Labourers - There are no general rules by the Common Law applicable to this class of servants exclusively. But by the Statute 3 Eliz. & 6 Geo. 1st all persons having no visible effects may be compelled to labour, & justices of the peace may settle their wages at the sessions - & those masters who give more or those servants who exact more are liable to a penalty -

5th Agents. This class of servants is various as Factors, Attorneys, Bailiffs, Stewards, Clerks in a Country House, brokers &c - The only difference between a broker & factor is this that the former lives in the same country with the principal, the latter in a foreign country -

The employer has not the same general control over the agent that a master has over his servant. The agents are bound by law to act in the employer, according to their contracts - But in general the employers have no personal control over them - So as agents act with respect to the property of the principal by virtue of his authority, they are considered as his servants

14th. 469. 4th Ed.
252. 297-8 -

Master & Servant.

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1 Woot. 169. 4 Com. 227.

The rules with regard to this species of servants are 1st That every agent is bound by Law strictly to pursue his Commission. It is his interest to do it for if he departs from his commission & a loss ensues he is liable for it; but when he does not depart from it, but follows it strictly, he is not liable for any casual losses

Amble 254. 1 Binn 493

2 Black Rep 1154. -

Exp 108. 584. 1 Best 4.

335. 2d 227. 523 -

A Factor may retain the goods of his principal not only to satisfy a particular debt a general balance in his own favor - The balance due for an agency as it respects certain specific articles is called a "particular" balance; & where there is a balance due for his agency as it respects all goods which have come to his hands in the line of his business it is called a "general" balance

But when he gives up these goods to the principal, he can never afterwards reclaim them. The Lien created by Law is gone - a Lien is a specific incumbrance created by Law in his person.

Cowp. 251 -

The Broker has also the same Lien upon the price of the goods in the hands of any one to whom he has sold them. Having sold the goods of his principal, he may order the purchaser to pay the amount to him & not to the principal - & if the purchaser does pay the money over to the principal, he does it at his peril, for if the Factor cannot recover it of the principal, he may have an action against the purchaser & recover

3 For 119. 1 Atk 134.

2 Vern. 117 -

But the Factor has no Lien upon the goods of the principal, unless they come to his actual possession. He cannot retain what has never come to his hands. A constructive possession is not sufficient to create this Lien or to cause them to become a pledge

So far as it respects the Lien the goods that are in the hands of the Factor are in the nature of a pledge. But how can there be a pledge when the goods remain in the hands of the Debtor? It is the duty of all agents as we have before observed to conform strictly to their instructions, & this is a rule that if the Factor gives more than he was authorized to give or buy, & then

than his commission warrants the principal may disclaim the purchase - If he buys more the principal may disclaim as to the excess purchased, but is bound as to the sum specified in his instructions - If the Factor sells for less than he is authorized to do, the employer may recover for the sum specified in his instructions - And thus the factor stands clear that he has acted reasonably & that the principal has suffered less than he otherwise would have done, & has no justification -

The proper business of a factor is buying & selling - but the factor has no right to pawn the goods of his principal - The act of pawning does not fall within his authority - & the principal may maintain trover against the pawnee, on tendering to the factor the balance of accounts due to him - I take it for granted he must give the pawnee notice - The pawnee is answerable even tho' ignorant that the factor acts in a representative capacity & that he is therefore disqualified to this use -

If the factor sells the principal's goods for less than his instructions authorize, the purchaser shall hold them. The factor may have an action against vendee in his own name & also an auctioneer may sue for goods sold at an auction in his own name, & this he may do altho the purchaser knew at the time of the purchase that there was the goods of another -

In one particular an auctioneer is not liable for a loss where an agent would be - for he is not under a rule he sells to the highest bidder for a less price than he was ordered to lay his principal - for there is an implied contract on the part of the auctioneer that the highest bidder shall have the goods -

1 Dec 510 -

4 Com 228 -

5 T.R. 604

Hut. 1168. 1 H. 361.

362. 1 B. & W. 648.

Butt. N. 130 -

1 Com 256 -

7 T.R. 349.

1 H. 362 -

H. 361. 31.

2 H. 361. 591 -

the owner of the goods on any third person who shall secretly attend the sale & bid for the goods in order to enhance the price it is made upon the same bidding as the sale is declared void -

2 B. & W. 10 Christie v. Busch 795. 2 T.R. 622. But see 1 T.R. 64. 14 n. 10
6 B. & W. 520.

18 Comp. 395- But if the principal orders him to set up the goods in the
first instance at a particular price & he sells for less he is
liable -

14 M. 24. 125- An attorney has a Lien upon the papers & judgment
217. 65% 2. 40. of his client for his fees, & he may direct the adverse party to
58% 1 Bar 564. pay the money to him & not to his client, & if he does, it is at his
4 RR 123. 6th 56th 56th But this Lien is subject to the equitable claims of the
8th 57% 7th adverse party, as a set off.

26 Ark 142. 96th 76th An attorney, who executes an instrument for a principal
6 SR 177. should do it in the principal's name & not in his own, for if he
7 SR 181. does it in his own name & not as attorney he binds himself &
Chiles 24. 27. 56. not his principal. The usual form is I. S. by his attorney & S.
But if it be done in this way I O, attorney to I S. it is good -

Com Big title 20. An agent can never bind his principal by deed, unless
Chap 15. he is authorized to do it by deed. He is supposed to do it in his own
7 SR 207. name, for a man may do it for another in his presence & then the
4 do 313. instrument on the face of it appears to be done by the principal
2 Rote. 8. himself -

On the same principle one partner cannot
bind another by deed except by deed authorized -

1 SR 172 An agent for the public, contracting, as such, is not per-
674. 18th 582. sonally liable on the contracts which he makes, as when
1 Root 89- a Commissary General makes a contract, & gives his own
note or bond. If it appears on the face of it that it was
given in the line of his duty - This was decided in the Supreme
court of the United States in the case of Mr Dexter -

Master and Servant.

Lecture 11th

¹¹³⁴ Debtor assigned in service - there are unknown to Common Law, but created by statute in Connecticut. The Statute provides that a Debtor committed in execution & having no estate to satisfy it, may be assigned in service by the superior or County Court if the creditor desires it, & the Court judges it reasonable. He must be assigned to some inhabitant of the State usually to the creditor -

In construing this statute the Courts have decided that it must be a fair & bona fide one, & tho a judgement has been recovered, yet the Court will look into the debt or cause of action & see if it be a meritorious one, between the parties & free from fraud as it respects their persons. The assignment is for a time certain during which the labor will amount to the debt & costs - the price of the labor is to be fixed by the Court. The Court never makes an indefinite assignment. This proceeding however is very criminal & Courts have discontinued it - for they will enquire into the age, the health, & the domestic relations of the Debtor as well as the Character & claims of other creditors -

Kirby 33

This assignment cannot be made to one & his heirs or to one & his assigns - it must be strictly personal to A. B. by name, because the Court reposes a confidence in the person to whom he is assigned & in no other -

Rules applying to master & servant generally
 When the Master is bound by the acts of the servant
 & when he can take advantage of those acts -

4 Inst. 109.

1031 429.

* N. B. 1209. ** 11. 506.

The general principle is that those acts of the servant which done by the Command of the master either express or implied, are in legal contemplation the acts of the master himself, & regularly those acts which are done by the servant in the performance of business in which his master has employed him are done by the command of his master in accordance with the principle of the Law,

"Qui facit per alium, facit per se" The questions then
 returns, what sorts of acts of the servants are done by the
 command of the master? It may be laid down as Law-
 1st That whatever the servant does by express command of
 his master, is the act of the master. 2^{dly} Whatever the master
permits the servant to do in the course of his business, he implicitly
 orders him to do, "qui non prohibet, cum possit prohibere, jubet"
 3^{dly} Whatever the servant does within the scope of a general
 authority given by the master, is done by the master himself
 because it is done by the implied command of the master -
 These three classes will include all the cases in which the
 acts of the servant bind the master - from this it follows
 that a contract made with a servant as such having
 authority from the master, is in judgement of the Law
 made with the master, & in an action founded upon it
 it is alleged that the contract was made by the master
 himself, & not for the master by his servant for it would
 be unlawyer-like! If the master money or property is taken
 from the servant by fraud, it is a wrong done to the master
 who may sue & recover - If a servant is robbed of his
 master's property in the absence of his master, a servant,
 or master may have an action against the thief - The
 reason why a servant may have an action in his own name
 in this case is, said to be because he is liable over to his master -
 This is not true - the presumption of Law is directly contrary -
 The true reason is the goods are the goods of the servant as
 against all other persons except the master; another reason
 founded in policy is that unless the servant has an action
 the goods may be forever lost - a recovery by either
 in this case bars the action of the other - It seems that

It thus appears that
 between two notes a change
 in the case of the master
 person is not liable to the
 act. 3dly, N. 16. 85.

Co. 29. 223.

1 Roll. 98 -

1 Roll. 105. 2dly.

613. 3dly. 26.

3 Mod 289.

4 Mod 303.

12 Mod. 54.

Master and Servant

Litch 127-

The commencement of an action by one party, prevents the other from prosecuting for the same act -

2 Lams 379.

3 Mod 289 -

When the servant brings the action in this case he decides as upon ~~the~~ possession of his own goods, because they are his against all the world but his master. Universally Bailiffs have a better right than any body but the master, the servant is not deemed as a Bailiff -

1 Hawk. 148 -

Lalk 316 -

Smith 145 -

But if the servant is robbed of his master's goods in the latter's presence, the master alone can sue, because the taking is deemed to be from the person of the master -

If the master's property is gained from the servant by an illegal contract as Gambling, the master can recover it back again, for the receiver is guilty of a violation of Law -

3 Bac. 559.

2 Str. 70 -

But if the servant wilfully squanders away his master's property, the receiver who is not supposed to know that it is squandered away, shall hold it - it being a general principle of Law that when one of two innocent persons must suffer by the act of a third, he who put it into the power of the third to do the wrong act shall suffer -

In case of an Innkeeper his liability for his servants is higher than common masters, for thefts of their servants. There is a good reason for this - Innkeepers are such as establish Inns or Houses of Entertainment for the accommodation of Travellers who are generally strangers - & who are necessitated to trust their property with them - & there is an implied contract on the part of the Innkeeper with the public that the property of the guests shall be kept safely.

1 Bl. 430. 3 Co. 32.

(Dyer 266.)

It is a general rule that if the servants of an Innkeeper or other guests, the master is liable. This is a rule of policy & an exempt case

for the servant cannot be supposed to rebel by the commands of his Master.

If one sells bad wine or provisions to the guest, the Innkeeper is liable, because it is done in pursuance of the master's business. In this case it is said the servant is ^{not} himself liable, tho' he knew the provisions were bad; & the reason given, is that he is a servant a person acting under the commands of a master. I see no reason in this rule. Suppose a servant should induce arsenick into wine, would it be an excuse in an indictment for murder, that he was a servant? But he is liable, because he does an unlawful act willfully.

This is a general principle of Law that when a man has no lawful power to do an act, the person doing it by his command is a wrong doer - Now the servant is bound to do only those acts which are honest & lawful - But he does an unlawful act & that knowingly? Why then is he not bound? Indeed, it is a general principle of Law that if the servant does an unlawful act, by the command of the master both are liable.

But it is said in some of the Books that if a servant does an unlawful ^{act}, in obedience to the commands of his master, of which himself is ignorant, he is not liable to the injured party. The master only is liable - This rule requires qualification for if the fact is in itself unlawful, or if it is lawful & yet accompanied with force, the servant is liable; the commands of the master to the contrary notwithstanding - The Law to be sure will not subject him criminally, but it will subject him civilly - Ex. gr. To cut down a grove of trees - the Law of Trespass does not regard the intention

1 Rolt. 95. 104.

430. ---

2 Bac. 595 -

1 Wils. 328 -

1 Bble. 430. -

3 Bac. 563 -

Exp. 580. 588.

1 Wils. 328. 1 M. 430

3 Bac. 563 -

2 Bble. Re. 882 -

Master and Servant.

Lecture 15th

Those acts of the servant which are not done by the command of the master express or implied are not usually considered as the acts of the master. However therefore the servant acts without the command of the master & not in pursuance with which he is generally or specially instructed, the acts are not the acts of the master.

3 Talk. 252. 166.

151. 8 T.R. 533.

Skin. 228. —

From this it follows that when any injury is done by the servant by these acts, the master is not liable; neither would he be if a contract was made in this manner.

1 East 106. 11 East 241.

472. Talk 441 note.

Contra 1 Wood. 466. —

Upon this principle it has lately been decided, that if a servant while actually engaged in his masters business commits a wilful injury to another, the master is not liable —

For ex. If servant wilfully drives his masters carriage against another & breaks it, the master is not liable; because the wilful act is not in furtherance of his masters business & therefore is no command express or implied.

Incidental authorities

for the principle —

or — 2 T.R. 154 —

3d 762. 6 East 406.

This case was a novel one at first. The Court however seemed to be clear in the opinion that the moment the servant committed the wilful injury he left his masters service & they considered the wilful act itself quoad hoc an abandonment of the masters service. It was not in furtherance or pursuance of his masters business express or implied.

6 T.R. 125. 5d 648.

2d 186. 442. 1 East 106.

186. 431. Talk. 441.

L.R. 739. 1 Wood 465.

50 Ba. 562. —

But if the servant in pursuance of his masters business does an act injurious to another thro negligence or want of skill the master is liable: on the principle that the Law requires that the master should at his price employ servants that are skillful & careful, but not that he should be an insurer for the unruly passions of the servant —

2 Bull. abn. 639.

143. 186. 431. —

If the apprentice of a Surgeon injures a woman thro negligence or want of skill when employed by the master, the master is liable. So if a Blacksmiths apprentice in shaming a horse comes to him the master is liable —

Master and Servant

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action in the case of Master & Servant
 servant driving horse in stable place
 main, which it was held the same with
 action on the case. Held 5 to 4
 12 Q.B.

An action on the case was brought for the servants
 wilfully driving his master's carriage against another's
 & breaking it. The action was brought against the master
 & held not to lie - for the Court gave as the only reason, that
 the action should be Trespass & not case, because the injury
 was immediate - The decision here was right but the reason was wrong.

6 Q.B. 125 -
 declared that the Defendant
 was not liable for the injury
 done to the carriage. 12 Q.B. 125
 6 Q.B. 125. 12 Q.B. 125

Soon after an action of Trespass was brought in the Court of
 Common Pleas for negligently driving master's carriage & the Court decided
 that Defendant had misconceived his action, for it should have been Trespass
 on the case - Afterwards in 1800 an action was brought in King's

2 Q.B. 442 -

1 East 106 -

1 Bos. & Pul. 472 -

Bench for wilfully driving carriage, & the Court decided that
 no action at all would lie. This is now Law, founded on
 sound principle - This action against the master should

7 24 M. 442

the master may be served with a copy, treated as
 a criminal & be compelled to pay a fine - But the master
 is not liable criminally for the acts of the servant done
 without his commands. - If it were brought against the
 servant it would be Trespass.

the case - If it were Trespass, it would lead to this conclusion,
 that the matter may be served with a copy, treated as
 a criminal & be compelled to pay a fine - But the master
 is not liable criminally for the acts of the servant done
 without his commands. - If it were brought against the
 servant it would be Trespass.

1 Bos. & Pul. 404 -

6 Q.B. 411 -

It has been decided by the Court of Common Pleas in
 England, that if one servant employs another servant, & the
 latter one is guilty of an injury, that the master is liable -
 This is not agreeable to the prevailing idea of the profession, & it
 appears to me inconsistent with the principles of Law -
 In this case the action lies only against the master or immediate
 agent - The intermediate servant is not liable, because he
 does not commit the injury - This rule has been carried so far
 as third or fourth servant - I think it is questionable on principle -
 for the I may be willing to employ A - I may not to employ B -

When the wilful act of the servant amounts to
 a violation of a contract between the master & the injured party
 the master I think is liable, for he is an insurer against the wrong done

Master and Servant

16 Bl. 158. —

3 Bl. 165 6. —

2 L. 910. —

Jones 93. 4. —

Under the case of a blacksmith's servant taking a horse for three is an implied contract on the part of the master that the horse shall be used skilfully. It being a general rule that when one undertakes to do an act for another in his professional business he implies & stipulates that he will use all necessary care & skill. I do not find the first rule in the books. But on general principles it must be so —

Question for discussion by Mr Gould & his opinion.

Can the principal be taken, by Bail in New York, on a bail piece issuing from Connecticut?

It arises in an action of False Imprisonment. In Connecticut it has been decided, in case of recaption, and an escape warrant, the backed by a magistrate in another State which makes no difference, for the backing entirely void that it was lawful to retake.

This question has several times arisen in the United States —

It never has arisen & probably never will arise in England on account of its local situation. & I know not that any such thing as a bail piece is known there.

In Virginia it was decided in the Court of Common Pleas that the Principal could not be taken in another state on such bail piece.

In the circuit court of the U. S. the question came up before Judge Patterson. & I am doubtful whether any decision was had except an opinion &异议 by Judge Patterson against the action of False imprisonment. (But I am to take it on general principle & I think the Bail can take the Principal. True, the process issuing in one State does not run into another.

My opinion on the
Hendy, Lawrence
continues

It has no authority there any more than blank paper
for if so, we must suppose that the jurisdictional authority
of one State extends over that of another. But this is not
the case. A Bail-piece is not an authority like a process.
It is not a process, but a written record or memorial that
it is, a Bail Special of B.

Now with such evidence has it a right
to take B? Under the Constitution of the United States, records of
one State are good evidence in another. Then the
question arises - can he pursue the Principal with this
evidence, & have a Lien upon him? If so, he can
pursue him as well as goods upon which he has a
Lien. It has been said that it is a breach of the peace
to take him in New York - But the same objection may
be applied as well to taking him in Connecticut.

If one takes goods & goes into New York, I may
pursue him & take them - So if he takes my horse
& so it is ^{in the} case of Bail - The principal is in the friendly
custody of the Bail - He is a prisoner of the Bail then
by virtue of the contract. & the Bail may imprison a confederate
him if he pleases, & the implied contract therefor extends
to the right to take him - The Bail then clearly has a Lien
on the body of this Principal - If so he may peaceably
retake him wherever he can find him, or he may
procure assistance. So arrest as soon as one State, the
Governor issues a warrant to the Executive of the other in
which he is, & he backs the warrant, that is puts his name
on it so - & then the prisoner can be taken - This
is by Statute of the United States.

Master and Servant

Lecture 16th

2 B.R. 832. 3 Wils.
309. Dury. 42. 2 D.R.
134. Coupl. 406.
Cass. 349. Salk.
18. Esp. 603.

A Sheriff is liable civiliter for torts or defaults committed by his under sheriff or officer in the execution of his business. For mere neglect of duty in the under Sheriff, the Sheriff only is liable to the party injured. But for positive tort, the under Sheriff as well as the Sheriff himself, is liable.

L.R. 646 -
Salk. 17. Bath.
487. Coupl. 754

From the analogy of Master & Servant, there have been two attempts made in England to subject a Postmaster - But it settles that he is not liable for the defaults of his servants. The reason given is that he has no hire from the party injured. He makes no contract with the individual who receives the letter. The Postmaster contracts with the public & receives his pay from the public. It would be inexpedient to subject him, because it would place him under an enormous responsibility so great indeed that no person would undertake the duties of his office. Indeed there is a general principle of the Common Law, which would discharge the Postmaster. When one servant employs another to do his master's business, if any injury arise, the intermediate servant is not liable; so it is in this case. The Postmaster is an intermediate servant. Same rule holds with regard to Deputy Postmasters.

3 Wils. 443. Esp.
623. Coupl. 765 -
2 B.R. 906 -

But the Postmaster is liable for his own actual defaults & so it is with Deputy Postmasters & all other servants employed in this department.

Coupl. 182 -

If a Postmaster receives more money to himself than the Law entitles him to an action of Indebitatus Assumpsit will lie against him.

Thus far of the torts of the servants for which the masters are liable.

We now come to his Contracts

Master and Servant

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2 Vern. 343-
643. 1 Pl. 457-
Comben. 450-
La R. 224. 3 Pl. 757.

As the Master lieth under many times for the tools, so it is more times bound by the contract of the servant. The general rule is, that those contracts made for the master, by the servant, within the scope of an authority delegated to him by the master, bind the master.

This authority may be, either general or special, express or implied. A general authority to contract is one which is, not confined to any individual contract, but which extends to all contracts generally, or all contracts of a certain kind, - as a Broker who has a discretionary power over the principals property - He has a general authority, because he has authority to make contracts of a certain kind. So, if a servant who is usually employed in purchasing necessaries for a family acts under a general authority to make contracts of that nature - so a steward -

1 Pl. 430 -
1 Bos. Com. 131-2.
A special authority is one which is confined to one or more specific individual transactions - as where a man orders his servant to sell his horse - as long as the authority extends no farther than to specify contracts it is a special one. A general authority is often implied from the masters frequent or usual practice - as in the case of necessaries before mentioned. A special authority may also be implied, tho it is seldom the case - whenever the master is bound by virtue of a special authority, it is most always necessary to prove this special authority - yet sometimes it is implied - as when a servant makes a contract in presence of his master, who says nothing against it -
From these distinctions between special & general authority, it follows, that if it has been usual for the

Master and Servant

3dalk 234 - Master to send the servant with money to purchase necessary
 10how. 95 - & has not permitted him to buy in any other way, the master
 11H 430 - is not liable if the servant takes up goods on his credit, because
 there is no implied authority - Secus, if he has frequently given
 the servant permission to trade on trust for him he gives him credit.

This general authority may be implied as between master
 and any particular individual & as between the master & the
 public in general - as if I have usually entrusted my servant
 to make contracts on my account with A & him only
 I give him no credit with the public; but if I permit him
 to trade with the public generally, I give him a credit with
 the public -

2dalk 234 -
 Chitton. B. 26.
 Co. bat. 450. Keble 625.

Where there is no authority either express or implied
 if the servant purchases articles & they come to the master's
 use, the master is bound, because this subsequent assent is
 equivalent to an antecedent authority -

But there have been doubts with regard to the application
 of this general rule to a particular case - as if a servant purchases
 an article on credit without any prior authority, having the
 money given him by his master to purchase it & he brings it
 to his master, who receives & uses it supposing the money
 to have been paid for it - I have - to the master, bound &c.

Exp. N. E. 47.

2d R. 224.3 b. k.

234. 3d R. 46. 10. n. 110.

2d R. 46. 6. 214.

* Exp. N. E. 350. deposed
 that he did not employ to
 know the private agreement between
 master & servant
 But so the case of Serv. getting
 master's coin & remained with
 master's authority. Held that he
 could not recover of
 the master 46p. n. 114.

If he is bound, it is on the ground of a subsequent assent -

But how can he assent to a contract which he is ignorant of?

We suppose the servant to have paid the money - there is

no subsequent assent - (not sealed by authority)

When a master has permitted a servant to trade for him

& of course given him a general authority, he may determine

that authority & discharge himself from future contracts

of a similar nature - This he may do by forbidding the

Master and Servant

1 Roll. 95. 8 Pl. 123
2 Br. 545. 3 Br. 560
* 2 Roll. 95. 5 Pl. 27
3 Br. 673. 3 Br. 577
Call 232. 9 Br. 177

servant sells an unsound horse at a fair. It is said the master is not answerable, unless he directed his servant to sell to a particular person. I see no justice in this rule or a hat difference there is between selling him to a particular person or setting the mischief afloat. That is putting the fraud on an individual or on the public.

* authority
at large -

If a Merchant's clerk sells goods & warrants them good the master is liable, even tho he expressly forbids him for the restriction is private & the credit public.

Lecture 1st

1 Roll 95. 2 Br. 123
2 Br. 563. -

The servant regularly is not liable for the contracts he makes for his master, because they are not made on his own account. Tho he is not regularly bound, yet he may personally subject himself - even when he is transacting his master's business, if there be an express stipulation to that effect. He here subjects his own credit & does not act as a servant.

2 Vern 127. 1 Br.
on Com 128. -

And undoubtedly if a servant makes a contract in his master's name, without any authority from the master, he is himself liable & not the master. His liability is hardly Mr G. thinks on the contract, because he made it in another name & the action may be founded on fraud or an implied promise.

1 Br. 430 -

Any one who acts for another & under his authority in his name, is his servant. A man's Wife or Children are often considered as servants on this principle, for the purpose of making a contract his wife & come under the general rules.

A Statute of Connecticut has introduced these words entirely novel & unknown to the Common Law. It provides that if any one under the government of a master is authorised by him to make a contract in his own name & even in his own business, the master is bound. It has been determined under it, that any contract which the servant makes in his own name & on his own account shall bind the master. That unless the servant is authorised, if he makes a contract it shall not be binding. This Statute does not extend to all servants. The Statute says "persons under the Government of" that is persons under the domestic government of masters. This does not I think extend even to menial servants if they are over age - but only to slaves, menial servants & apprentices under age. & the contract on the part of the servant is itself void & not a contract. *See* Lib. C. Brown 1809 - Statute 487.

How far the Servant himself is liable for his acts and defaults to Strangers & to his Master.

The general principle is that those acts of the servant which are not done by the Master's commands express or implied are not in judgement of Law the acts of the master & therefore for these acts the servant is himself personally liable. This is the correlative rule of the former one - as the master is not liable it follows that the servant is. The wrong has been done by the servant. The relation to his master does not excuse him. He is therefore bound. Those acts which are done not in pursuance of any business or authority with which the master has entrusted him, are not regularly done by the Master's commands. A general master not liable for what his Servant

There is another class of cases in which the master & servant are both liable & the action may be brought against either. If the servant in the performance of the master's business does an injury, this negligence or want of skill, the servant, as well as the master is liable to the injured party provided the transaction was not governed by a contract between the master & the injured party. But I conceive that the master may be liable if the act amounts to a violation of the contract between the master & the injured party. In the case of a Blacksmith's apprentice who in doing a horse shoe drew the nail by the hand of his apprentice, violating the contract.

See 562 -

See 228 -

See 431 -

See 603 -

See 18 -

See 175 -

See 1083 -

See 328 -

See 220 -

See 125 -

See 431 -

See 603 -

See 586 -

Carth. 58. 1 Vent.
140. 258. 3d R.
220. v. 206. 252
125. Inguano -

There is an exception to this last rule, which is in the case of a ship-master - he is liable to his freighters who generally contract with the master the owners are not known. It would therefore be unreasonable to compel freighters to seek a remedy against the owners, who are unknown to them & who may live at a great distance, when they can be indemnified by the master. General convenience & sound policy seem to require this rule, even when the contract is made by the owners or their agents.

On the other hand of a servant committing wilful tort, he is always liable to the party injured, & this even though the transaction was founded on a contract between the master & party injured - for in this case the act is not in pursuance of the master's business - it is not the thing contracted to be done - It is a distinct collateral wrong -

Cough 64 -
182

An action of indebitatus assumpsit will not lie against an officer of the revenue for an over payment - For it will if the money be expended illegally for his own use - This is in strict analogy with the rule above - for then he acts for himself & not as a servant -

1 Roll 95.
1 Mod. 209 -
2 Ba. 595 -

Where an attorney knew of the release of a cause of action, between A & B, & when he was a witness to that release & afterwards he brought an action founded on that original cause of action, he is not liable - the reason is it is not for him to decide whether his Client has a cause for action or not - He may advise, but the Client must decide whether he will sue or not - But an attorney is ^{not} more privileged than any other person for, raised in his profession

London 125. Exp. 618.

whitbread -

And where the Plaintiff's attorney after a non suit suffered, entered up judgement against the defendant & took out execution, he is liable to an action at the suit of the party aggrieved -

Master and Servant

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There are many cases in which the servant is liable to the master - And it is a general rule that he is liable for all willful wrongs or defaults, or in other words all violations of his duty, by which the master is injured. But no action will lie for a mere breach of order, if no damage is sustained - nor for ill manners - His remedy here is wholesome correction -

The violation of duty on the part of the servant need not consist in breaking an express command - He is liable for a breach of an implied one - So an attorney is liable for neglecting his clients case - So also where a merchant's clerk landed dutiable goods, before the duties were paid & in consequence thereof they were forfeited - Here the servant was held to be liable to the master -

The general rule is, that whatever a servant undertakes to do, he undertakes to do with diligence & fid duty - not with thought & skill - He is then liable generally to his master for injuries caused by want of diligence & fidelity -

Whatever one undertakes to do for another in the line of his business & occupation, he impliedly engages to use all necessary diligence & skill in performing - From this it follows that the servant is not liable for the loss of his master's goods effected by Robbery - This proposition admits of exceptions as in the case of a Bailee; if he wantonly & imprudently exposes himself in a situation where Robbery might be expected he is liable -

Generally then, the servant is not liable for the losses occasioned by accidents against which ordinary diligence & fidelity are not sufficient. Of course he is not liable for any of those accidents which are beyond human control - But the jury are the judges -

Master and Servant

2 Ch. 1083—

10 mod 109—

8 TR 186—

Hardw. 164

Kilby 116—

11 Chanc. 111. 130.

12 Ch. 125. 6 Chanc.

179. 1 Vent. 70. 2 Mod.

167. 8th 120. 30 Dec.

5 C. 6. 1 H. 173. 7.

1 Bl. 428. 2 H. 693

2 mod 167. 8th 120

3. Ch. 466.

The servant is in general liable to the master in consequence of the master having been subjected to third persons for injuries done by the servant through negligence or want of fidelity. This does not extend to cases where the master is not liable. This rule supposes the master not to have been actually a party in the wrong committed. Secus. he has no claim upon the servant. For then they are both tortfeasors & the maxim of policy is *ut maleficia non auter actus* & *Politi est candidus* & *et maleficia non auter actus* in pari delicto melior est conditio rei soliti. — Of the Master's authority over the Servant.

The master has by Law a right to chastise his servant for any breach or neglect of duty — as disobedience, negligence or insolence. He has the same right to correct his servants that a father has his minor children. He is ^{supra} *domesticus* government. But this correction must be reasonable or it cannot be justified. The chastisement however must be unreasonable i.e. clearly without cause, or excessive in degree, to subject the master. And in an action brought by the servant, the jury under the direction of the Court, will judge whether the correction be reasonable. Same rule obtains between a school master & his scholars.

But this general rule cannot apply to all servants. Servants of the 5th class are not in general liable to correction. & I doubt, indeed, whether the master has a right of correction at law over other servants except those who are in his family. The right is like one's right to correct his ^{master} children, & supposes the person to be under the domestic government of the

Master and Servant

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There is however very little on this subject in the Books. The distinctions are not made.

But, master has a right to chastise his slaves, apprentices, & menial servants, as the case may be, in Connecticut his Sella who is assigned to him in service. But as it respects other servants, I doubt whether this right exists.

1 Bl. 428 -
Hibb. N.B. 168 -

It is said by Blackstone that for master beats any other servant of full age, except slaves or apprentices. He is not justified & that the servant may on this account leave his service. This cannot extend to menial servants. And the wife instead of the master gives the correction the servant may leave his master's service.

2 Mod 167. 8 do.
120. 208. 330 -

The master can never justify wounding his servant. The correction must be reasonable & moderate, & in judgement of Law it is not so when it amounts to wounding. By this term is meant a laceration, or contusion.

If then the servant sues for an assault, battery, or wounding the master may plead a special justification as to the two former; but as to the wounding, his only plea is "not guilty".

5 Bar. 567 -

By statute 4th Ann, the master may plead double, not guilty as to the whole, & a justification (moderately castigant), as to part.

In pleading this justification it is necessary to state that the Plaintiff was retained in his service, the place where retained & the business in which he was to be employed.

9 Co. 76. 2 mod 167.
2 Bl. 310. She 953.
Geo Jay 360. 2 mod 167.
3 Bar. 567 -

for these are all matters of fact which are issuable. This right of correction is strictly personal & peculiar. The master therefore can by no means delegate it to any one. He cannot employ a third person to do the correction for him.

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There is a case however in which a servant may be chastised by another servant and that is the case of a School-master. This is no exception or qualification of the rule. It is no delegation of Authority. The right of the School-master is distinct from the right of the Master of the Boy. He chastises him in his own right.

If the master in chastising his servant should kill him - He would be guilty of Excusable homicide, manslaughter, or Murder, according to the circumstances of the case.

It has been formerly questioned whether a servant who executes a Deed to discharge his master from duty, can avoid it as the Law now is he cannot.

Lecture 18th

Of the Master's remedies against third persons for injuries done to himself, in relation to his servant.

The Master, in general, has an action against any one who takes away his servants in which case the "quarantam" or "gist" of the action is "the loss of service". Of course it must be laid with a "per quod" "per quod servitium amittit": whence he has a triple action for he is not interested in the point.
If once servant be forcibly taken away, an action of habeas corpus may be maintained by the master. This should however be laid with a "per quod" for tho he declares upon a forcible taking, he must show what the injury is that he has received. If no force be used, case is the proper action tho habeas corpus is best in England.

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So also if a servant without being entirely voluntarily leaves his master's service, & he is retained by one who knows of his former retainer, the third person is liable to an action upon the case in favour of the master.

May 10. 106.

2 Rev. 63.

Whether the right of the third party to the master in an action for his servant's wrongs is affected by the fact that the servant was not in the master's service at the time of the wrong.

But if the employer does not know of the former retainer, he is not liable to the former master, for it is a "damnum sine injuria"

July 380 -

3 do. 191 -

Lat. R. 1116 -

If a servant is forcibly taken away from his master, the person taking him, may be indicted for a personal offence, because the forcible taking involves a breach of the peace - But no one can be indicted for carrying a servant away, because the injury is entirely a civil one.

9 Co. 113. 10 do. 131.

2 Bulst. 198. 1 do. 175

Bro. J. 618. 9. 10 do.

1082. 1181. 429. 9 Co.

113. 10 do 131. -

When a servant is beaten by a stranger, the action for the mere Battery can be brought by the servant only - The master cannot maintain an action for this battery, as such - But if by it he loses the service of his servant, he may maintain an action in his own name - one is injured in person, the other in his interest - Consequently a recovery in one action is no bar in the other. But in this case, the master must declare with a per quod & if there has been no actual loss, he cannot recover - The per quod is the gist of the action & without it the declaration is demurrable.

1 An. 595 do. 2 do. 944.

See Title App. & Car.

2 W. 146. 5 East. 472.

3 Brown. 1878.

The 1854 H. of Com. 183. 907.

No action for excessive damages in 1844

3 W. 18. 2 W. 186. Peter. 909.

A minor child is a servant within all these rules & an adult child may be as well as any other stranger. Hence a parent has the right of a parent to an action for the loss of his daughter's service in that well known class of cases - This action cannot be brought for the loss of a child - His parent's action is for the loss of service however - The loss of service however does not furnish the rule of damages - very aggravated damages are sometimes given - There must however be some nominal loss of service in all these cases.

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But if a stranger beats the servant of another so that he dies, the master has no remedy or private satisfaction for the civil injury; the private wrong is in the case merged in the public wrong. The master cannot in judgement of Law have any recovery, because by the felony the life of the offender in England all his property is forfeited, of course a recovery would be unavailing - but according to our Law means of satisfaction are left his property is not forfeited so that there is here no merger.

If one's Servant is injured by the wanton conduct of a surgeon, the master may maintain an action with a per quod. But Mr G. thinks he cannot if the servant is injured thru negligence or want of skill. on the books are silent. No undoubtably the servant would be entitled to an action in both cases. The general rule is that he who does an unlawful act is liable for all the consequences of it.

In the case of a servant enticed away or voluntarily leaving his master's service the master may have an action against the servant or the retainer. But he cannot have both for a recovery against one is a bar to the other. But whether a recovery without satisfaction is a bar or not is doubtful. I think it is when recovered from the servant a bar to an action against the wrong doer - yet I think a recovery of judgement of full satisfaction against the enticer does not bar an action against the servant on the contract.

Yels. 89. 2 Roll
568. The R. 389.

Roll. 98. Roll. Rep.
124. 2 Bule. 332

Exp. 610. 2 Will.
339. La. R. 214.
1 Roll. at. 90

3 Burr 1353-4.
Exp. 319. Yels. 63.
5 Ba. 185. 4 do
116.

(1) Master and Servant

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What acts Master & Servant can justify against Third Persons, in each others Defence.

1 M. 429. 2 Roll
Ab. 115 - To abet & assist a third person in a Law suit, amounts at Common Law to maintenance; yet a master may abet & assist his servant in an action against a stranger & not be guilty of the offence of maintenance -

2 Roll 540. 1 M. 429. A Servant may justify clearly an assault & battery in defence of his master's person, may it be his duty thus to defend him. He can do for his master, whatever the master himself might do in his own defence.

3 Ba 568.
2 Ld. 1481 But a servant cannot justify a battery in defence of his master's son, or other member of his master's family, except his wife who perhaps he may defend. He is servant only to his master & this relation is strictly confined to his master's goods; this right is personal & attached only to the master -

But whether a master can justify a battery in defence of his servant has been much questioned & the opinions are flatly contradictory - It appears to me that he can, & that the rights are reciprocal - The master has an interest in the soundness of his servant & therefore he ought to be entitled to defend him - The only reason given in support of the contrary opinion is that the master can have an action for the loss of his servant's service - But this is good reason why he should be justified in defending him. Besides the remedy is precarious, the person who commits the battery may be a vagabond & so no recovery can be had - A man may justify battery in defence of his goods, why not then in defence of his servant?

2 R. 62. 2 Roll 546.
Salk 407. 1 M. 429
Laws 22. 124-5 -

Master and Servant

- As to the Master's liability to provide Medicine &c for his
 2 Rep. N. 739. - servant, there have been but three decisions in Eng. The first is in
 2 Rep. N. 739 where Lord Mansfield held that the master was
 not liable - that the Parish was bound to provide for accidents -
 1 do. 270 The next decision is in 1 Rep. Ref. 270 & cited in 3 Bos. & P. 248 where
 Lord Kenyon at St. Paul's held that the master was liable. But in the
 last decision in 3 Bos. & P. 247 the whole court in discharging a motion
 to set aside a nonsuit, held that the master was not liable - that
 3 Bos. & P. 247 - the parish was alone liable unless there had been an agreement on
 the part of the master to find the servant with "necessary medical &c -"

Sheriff

Lecture 19th

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1 Bl. 339- The word Sheriff is derived from the Saxon words "Shire" and "Reeve" which mean the Governor or Keeper of the Shire or County. In modern language the word "County" has supplanted that of "Shire."

1 Bl. 340
d. 341
d. 342
4 Co. 32- He is the highest officer in the County, in England is appointed by the King from a nomination of three persons, from each County selected by the twelve judges & other high officers of the State. Formerly they were chosen by the inhabitants of the several Counties. By virtue of several old Statutes, the Sheriffs are to continue in their office no longer than one year. This rule however is frequently dispensed with & Sheriffs are appointed "durante bene placito" & such is the form of the royal writ. It is now very common for the King to appoint what are called "Pocket Sheriffs" durante bene placito.

In Connecticut they are appointed by the Governor & Council - one for each County & hold their offices during the will of their appointor - so that their office terminates only by death, resignation, or removal.

4 Ba. 235- At Common Law, the Sheriff must reside in the County for which he is appointed, & if he remove out of it, he forfeits his office. It is supposed by Mr. Co. that this rule would be adopted in Connecticut.

4 Co. 342- A Sheriff was regularly no jurisdiction out of his own County, if it is necessary to go out of it for the purpose of completing an official act, he is authorized to do so for that particular purpose. E.g. if a Sheriff should become necessary to take witness from a party having conducted in

Sheriff

him or he officer could take him from jail out the Prison
of the County he has authority to complete the act by carrying
him into another County where a man is sent is holding

So also if Sheriff of this County should be required to
attach scabs here according to a ^{process} ~~mandate~~ coming from another
County he may & has full authority to go into the other
County & there complete the service. He must be leaving
a copy of the process at the place where he is

So also if a person in the Sheriff's custody should
escape & flee into another County the Sheriff or his
officers on process may retake him in another County

The Sheriff so far as he is a ministerial officer
may appoint under sheriffs or deputies, ^{as he is} ~~as he is~~ common law
who become his servants & may therefore execute all
the ordinary ministerial duties of the Sheriff the maxim
here being *qui facit per alium facit per se*

By recent statute of Connecticut, a Sheriff cannot
appoint a general Deputy without the approbation of the
Court of Common Pleas of the County for which he is appointed.
But he may without such authority appoint special dep-
uties. A special Deputy is one appointed *pro re nata* to do
some particular service & he has no authority to execute any
writ but such as have a deputation inscribed on the back of
it by the Sheriff. A general deputy is one appointed to act
by warrant from the Sheriff at the ordinary ministerial duties
of a Deputy, & the County Court the jury may reject the
nomination of the Sheriff. He has no power to nominate or appoint.
The Sheriff of one County may not appoint the Sheriff of
another County his special deputy without the authority
of the County Court.

20
1000 37
4 Dec. 435

2000 13 -
4 Dec. 437

but this Deputy cannot act out of his local County - Whether any one else than a Sheriff can be appointed out of the County is uncertain. The rule is founded on usage & sanctioned by Statute -

The Sheriff may remove his Deputy at pleasure, for he is merely the agent & servant - Attorney of the Sheriff. (Bate's case) He continues in office the Sheriff cannot abrogate his power - or take away any of the incidents belonging to his office - This of course is appointed Deputy for his County. The Sheriff cannot limit his authority to any one town, nor to any particular process.

Under Statute of Connecticut Count. 'Can P. has may perform no end or entirely disqualifies & prevents from acting in their County -

In England the authority of a Sheriff is entirely derivative - He is representative - He acts officially only in the name of the Sheriff - When he executes a process he uses the name of the Sheriff - He derives all his authority from a contract made with the Sheriff - Deeds writs in England are never directed to a deputy, but to the Sheriff himself - The Deputy is authorized as a general or special warrant from the latter, for in it not regarded as a known public dependent officer -

These writs may be & generally are directed to the Deputy - So that he is here treated as a known public officer & he makes his returns & endorsements in his own name - It has been determined in P. Court that a writ directed to the Sheriff may be issued by his general or special Deputy the thing is not particularly described in any direction & that too whether it be on mesne or final process - It is the same in England -

A Covenant of the Deputy not to execute certain process is void as it is against Law & contrary to his duty, which is that he execute all process that is offered him -

Alb. 95 -
2 Brownlow 281 -
Bate's case -

Alb. 95 -
Camp. 65 -

Trinity 237 Bac.
Alb. 100 - 47. 174.
No. 339. 1. Alb. 1295-6.
No. 4. 271. 16th. 12. 13.
Hart. 174. 77. 78. 2 M.
12. 332

Gov. 14

Sheriff

The Sheriff may delegate his authority, but the deputy cannot his for his authority being itself derivative cannot be delegated. This rule holds true as well "in placito" as in jurisdictione. The deputy must therefore do his duty in person. The other may assist him.

4 Co. 442 -

A member of the House of Commons in England cannot vote by proxy, (but a peer whose right is hereditary may do it) on the general principle that he ^{has} acts in a derivative capacity, cannot delegate it. But he who acts by an inherent, independent right may do it.

When it is said that a ^{sheriff} cannot delegate his authority, it does not mean that he cannot have persons to assist him, or that he may not command assistance, for both these he may do, he may command the posse comitatus but this is not a delegation of his authority.

6 mod. 211 -
Co. Litt. 107 on 181.

This said is to mod. Ell. that an arrest by an assistant is not good. But this I think, needs qualification - as will be seen hereafter - This is in an arrest by an assistant when the deputy was absent.

1 Inst. 181 -

If the sheriff direct a warrant to two persons to be a return, ~~for~~ either of them may execute it, for where the authority is of a private nature it is joint but where of a public nature it is both joint & several.

1 Brok 98

4 Co. 34. f. 119

If the deputy is guilty of a neglect of duty, as suffering an escape or the sheriff may have an action on the case against him for the sheriff himself is liable over to the Plff in the process - He is ex officio keeper of Jail & common prison in the County - hence his right to appoint & remove the goaler, who is his servant, "in placito."

2 Co. 202 -
Litt. 16. 181 -
3 B. Salk 408 -

The sheriff has regularly no right to confine his prisoners in any other place than the common jail or prison, this being the place appointed by law for the custody & keeping of prisoners.

If therefore a sheriff should confine a prisoner in a private house, or any other place but the common jail, he would be liable in an action for false imprisonment except where he was necessitated to do it, as if the jail was broken open, blown down &c.

Inst. 48-

tit. 465-

2 Br. 269-

The Sheriff being (as before observed) ex officio keeper of the jail, cannot be arrested on civil process - he cannot be confined in any jail out of his County for that would be unlawful - he cannot be confined in the jail within his own County for as he is the governor or keeper of it, he can set himself at liberty - if a deputy sheriff should arrest him he could instantly discontinue his authority by removing him from office, or if a constable should arrest him he could not commit him to prison for this must be done by the goaler, who is a mere servant of the Sheriff and removable at any instant he pleases to do it.

But if there are two common jails in the same County & one of which he is not the keeper, I see no reason why he could not be committed in it.

Generally the Sheriff is keeper of all the jails in the County - What then is to be done? especially when the Sheriff is taken as a criminal? There is no definite rule laid down. But I suppose he is to be confined in the jail of an adjoining County ex necessitate rei, for if he cannot be arrested in a criminal case, he cannot be tried - In civil cases this necessity is not supposed to exist. So Sheriff ^{may} cannot be imprisoned in civil cases & if he manages a male prisoner he is liable of an escape.

11. 2. 65.

Sheriff.

The Sheriff may then on a civil case be holden to hear without an assize when in case of crime.

Sheriff cannot execute process which he is party in his own name, but his deputy may do so here because he is known as a private officer.

Lecture 16th

Liability of Sheriff for the acts or defaults of his Deputies or under Sheriffs

The deputy being the servant of the Sheriff, the latter is in many instances liable for his acts & defaults. The acts of the servant of under Sheriffs being considered as the acts of the master or Sheriff himself. *Qui facit per alium facit per se*.

Rules 18 -

However it is that the Sheriff is allowed to take from his deputies security, for the faithful discharge of their duty. Not on the ground of the Sheriff's own responsibility to the Plaintiff in the process. The security taken is in the nature of a bond to save the Plaintiff harmless.

Litch 187.

600, 330

1000 238

2 L.R. 1381

2 L.R. 1544

Doug. 47 -

The Sheriff, I have before observed, is liable for the acts of his servants in many cases. It is a general rule that the official acts of the deputy as to all civil purposes are the acts of the Sheriff. It is by a fiction of Law - but the Law never by fiction makes one an offender, that is, criminal; therefore for the criminal acts of the deputy he is not liable, for these are not constructively the acts of the Sheriff. To exemplify - If the Deputy to whom a writ is directed refuses to execute it & in consequence thereof the Plaintiff in the process suffers damages the Sheriff himself is liable - & so also for a false return. But if the Deputy

Sheriff

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has made the arrest, & then commits murder or an assault & battery on the body of the Defendant, the Sheriff is not liable criminally tho he is civilly.

1 Roll 94.
Cro Elia. 175
1 Lev. 146

Again, It is very clear that the Sheriff is not liable for the private torts of the Deputy, for it is only for his official acts that he is liable & in his private torts he does not act as a Deputy Sheriff.

1 Roll. 94

Upon this ground that the Sheriff is not liable for the private torts of his Deputy, it has been made a question, whether if the Deputy under an execution against A. instead of levying on the goods of A. by mistake or some other reason levies on the goods of B (the Sheriff not being privy to the act) the Sheriff is not liable, as the Deputy has not pursued his warrant, or whether the only remedy is not against the Deputy - There have been no decisions on this point, but W & G thinks it ought to be considered as an unofficial act, & therefore that the Sheriff ought not to be liable - unofficial, because the writ does not direct the Deputy to levy on the goods of B but on those of A - The Deputy's pretending to act under authority of Law is no reason why the Sheriff himself should be subjected. By the more modern decisions however he is considered as liable: it is so settled now - (see 2 Hobb. 146)

4 Ba. 442 3.
Note -

3 Wils. 309. 2 M.R.
832. Day 42

At Common Law the Sheriff alone is liable for a neglect of duty in the Deputy. Thus if the Deputy or gaoler suffer an escape neither of them are liable to a suit by the Plaintiff in the process: But the Sheriff is & the reason is that

Daugh. 402-4
Esp. Dig 603 -
1 Roll 94

Salk. 18-
56. 89.
5 Co. 89.
2 Ba. 243

neither the Deputy nor goaler are officers known at Common Law to the public & besides they are total strangers to the Plaintiff in the process. So if Deputy omits process he is not liable to any one but to the Sheriff.

Pro. Ch. 175-
743-
Salk. 18-
3 Mod. 321.
Cro. Jac. 330.
East. 106-
3 Lev. 258-

But for a tort committed by a deputy in his official capacity, he as well as the Sheriff is liable to the party injured. The Sheriff is liable because the wrong is done by his servant, & in his official capacity, & the Deputy is also liable W & G thinks because the party aggrieved may consider the Deputy as a mere tort feasor. (By breach of duty is meant only neglect of duty, on this ground only are the decisions reconcilable by a tort is meant an actual misfeasance & not a mere nonfeasance or neglect of duty. There must be a positive wrong done, & not a mere negative one, to make it a tort. Thus for a voluntary escape, permitted by the Deputy, the Deputy himself is liable, for this is an actual & positive tort but for a negligent escape, he is not, that being nothing more than a mere nonfeasance. So also if a Deputy has an execution in his hands, & omits to levy it, he is guilty of a nonfeasance only, yet if he levies it on a wrong person he is guilty of a misfeasance & is himself liable as well as the Sheriff. In Connecticut however the under sheriff is liable for neglect of duty, as well as for a tort committed in the Execution of his duty. & the Sheriff is also liable in both cases at Common Law. The reason of the Sheriff's liability is that he is here known as the officer of the Law. The process here being directed to

* If there is a comparison in the words of this dictum, can we find there is no one liable?

The Deputy, he is known to the Plaintiff as being a known officer, whereas in England it is otherwise, the writ is never directed to him; in that country he is not a known officer & the process is never executed in his name. Indeed deputies are so well known here that they may bring suits in their own names as deputy sheriffs against third persons, as is every day done in receipts taken by them for payments.

Where a Sheriff appoints a special Deputy by his own mere motion he is liable for his acts as in general deputy; but if he appoints another by the nomination of the Off. to execute his process Sheriff is not liable either for misfeasance or nonfeasance. The reason is that the Sheriff appoints at the request of the Off. & he ought therefore to conform to the rules of the common Law as all Law here except the distinction ^{between} torts & neglects of deputies. Here the Sheriff may be liable for neglect & torts & so is the Deputy in the action. He is regarded as a known public officer.

It has been observed on occasions before that the Sheriff is ex officio keeper of the goal in the County for which he is appointed & after the death of the Sheriff & before another is appointed, a person escapes, no one is liable. It is clear that the old Sheriff cannot be liable for acts committed after his death, nor even his estate for those escapes before his death, for "actio personalis moritur cum persona". It is equally clear that the new Sheriff cannot be liable for acts committed before his appointment & neither can the goal be, for by the death

Sheriffs

1 med. 14

of the old Sheriff, his power, *ipso facto* ceases. Therefore as I said before, no person can be liable for such an escape. & in case of an escape under such circumstances, the only remedy the Plaintiff can have is recaption. & this Mr. G. thinks he might do, untill a new Sheriff is appointed - for he could not be committed to prison, there being no goal in existence to receive him.

Moore 55th 22

Salk 323

bro. 94-73

1 Roll 893 44

If a Sheriff having begun execution, as by levying upon property, is removed, he may still proceed to complete the service; for the service of the Execution is an entire act. & it is said that he holds over until completion of service. & he of all officers qualified to serve process, as deputation, Constables, &c.

Authority and Duty of Sheriffs

The the subject which I am now considering is entitled "Sheriff" yet I have thus far considered under it, all persons who are authorized to execute process.

187. 343

By the Common Law, Sheriff is a judicial as well as executive & ministerial officer - as a judicial officer he holds a Court of record & presides in it. But here he has no judicial power; it is purely ministerial, tho' partly executive. A judicial officer, is one who hears and determines causes, & is called a judge - An executive officer is one who executes Law by virtue of his official power, without any command from his superior. A ministerial officer, is one who executes Law under the command of a superior. The Judges of our Court, are Judicial officers - The Governor of

Sheriff.

of the State is an executive officer. Sheriff as before observed, are principally ministerial; but sometimes executive officers - I shall first treat of Sheriffs as Conservators of the Peace; in which character they are purely executive & not judicial officers; & secondly as ministerial officers.

Moit. Rep. 237.

1861. 343-

State Statutes -

1. As Conservators of the Peace they act by virtue of their General authority. They are the first executive officers in the County, & superior in rank to any person therein, during their continuance in office.

At Common Law he may apprehend & commit to prison all who break or attempt to break the Peace throughout his County - and thus he may do as Conservator or Keeper of the Peace - or he may bind them to keep the Peace - He is bound also to pursue & apprehend all Thieves, murderers, Felons & other criminals, & to commit them to prison for safe custody & he is also bound to defend the County from enemies of the Peace, & for all or any of these he may, without warrant command the posse comitatus & at Common Law every person is bound to obey this summons, who is above 15 years & below the degree of Pe. & thus when warning given neglect to attend they are punishable by fine & imprisonment.

1861. 343. -

Co. Lit. 168. -

11 Bar. 480. 453 -

1 Park. 168 -

By Statute of Connecticut & the Sheriff is bound to suppress all riots, tumults, routs & unlawful assemblies, and for this purpose he may command the posse comitatus This seems to be merely an affirmation of the Common Law -

Sheriff

The same statute gives the same authority to deputation & constables within their respective towns —

2nd Ad. Ministerial Officers, Sheriffs are bound to

146. 344

Plowd. 74

Lyer 60

execute all legal process regularly directed to them, & on refusal, they are by Common Law subject to imprisonment & likewise liable in a civil action on the case to the party injured —

He is not indeed bound to execute at all events, ^{strictly} ~~strictly~~ occupation in his official capacity, & on general whateance excuses others excuses him

Long 446. 132 58

206. 346. 24. 24. 24

293. 24. 2. 616

In Connecticut Sheriff is liable to an action on the case for not returning writ. Recog in England in the rule there is to command the return in four days & then attachment issues in a summary process —

By Statute of Connecticut, on tendering a writ to the Sheriff or other Officer he must if demanded give receipt for it, in order to facilitate if necessary the proof of its delivery to him. And if on demand he refuses so to do, the Plaintiff may call on the persons present to set their names as witnesses to such delivery. This also applies to Constables in their respective towns. This very rare however that a receipt is demanded for an original writ. It is seldom given other except in final process —

Lecture 21st

A known officer as a Sheriff, general duty in contact is not bound to show his writ to the Defendant before he arrests his body, or seizes on his property altho the Deft. could demand him to. He is bound to have him. Thus per. 9 Co. 69. b. a. hq. 485. b. h. d. 604. 8 R. 187. If he arrests because the writ is not thus shown he is liable to the officer in it. But as soon as officer has arrested his body, he, or taken his property, he must make known the contents of his writ, with all convenient speed in order that the Defendant may obtain Bail, or agree with his adversary.

But a special officer must make known the contents of his writ, if demanded before the arrest, if not demanded it will be shown. This showing is usual because he is not a known officer. The true principle is this. An individual is obliged to submit to an arrest without having some evidence. The persons authority to arrest him if upon one could attempt an arrest without furnishing this evidence the Defendant may lawfully resist him. In case of a known officer, this evidence is furnished without showing the writ, but in case of a special officer or a person deputized by a magistrate for that particular purpose the evidence of his authority must be shown if required.

But in many criminal cases, any one without warrant may arrest the offender & the law can easily cannot show any warrant or authority, but still the principle is here pursued. For as to this purpose every member of the community is a "known officer" with full power & authority given him by law to arrest.

Sheriff.

The Sheriff, & the Law of the Land which gives him authority every man is supposed to know -

2 Inst. 143 -
453

The Sheriff or his Deputy may at Common Law command the Peace Commissioners if necessary in the execution of his office in any matter in a civil process -

This applies here as well as in England -

But a Statute of Connecticut declares that in case of great opposition be made against the Sheriff in the execution of lawful writs signed by lawful authority, or in serving the lawful processes, or on suspicion that such opposition will be made, that the Sheriff with the advice of one Assistant or Justice of the Peace, may raise the militia of the County - But his he might do at Common Law - & the Statute further declares that the Sheriff shall not return that he cannot do Execution & all militia officers are liable for not attending orders of Sheriff & Soldiers \$10 -

This however is a distinct provision from the Common Law in this particular that the Common Law calls on all persons in the County to assist, but the Statute only the Militia - The same authority also is given to constables in this respect in towns.

260 1/2
Ho 91. 604.
Geo. 91. 909.
York. 62. -
Exp. D. 604.

A Sheriff is bound to execute all legal process regularly directed to him - but the execution of it must be regulated by the mode prescribed by Law. He may not therefore break open any ^{door} or window of a dwelling house, in a civil action to arrest the body or take the goods of another. For the Law considers a mans house as his Castle, & the breaking in might expose a mans house & family to Robbery.

The reason for this rule Mr. G. thinks very frivolous & in fact no longer in reality existing except by authority only. It is founded on feudal notions & is a reproach to our system of jurisprudence. But nevertheless it seems to be Law.

If then a Sheriff breaks the outer door or window, of a house for the purpose of arresting the body or taking the goods of another he is a Trespasser. But agreeable to a dictum in Coke & some old authorities the arrest is good, tho' the officer becomes a Trespasser. This dictum Mr. G. thinks highly preposterous, for that a person should acquire a civil right by a violation of Law is against the very fundamental principles of that Science.

The modern practice of the Court of Westminster Hall is to discharge the person on motion & set the service aside & to give the person arrested an action against the officer & it is so decided in Delamain's case. Tho' this question has never arisen, except in this one case, yet Mr. G. considers this as well as the practice in Westminster Hall to be Law.

The Court however will not always discharge on motion: it is discretionary in some measure with the Court to discharge or not.

This privilege of the outer door &c. is ad idem to the Law & is to be construed strictly. (as Lord Mansfield says) "not to be extended by any equitable or analagous interpretation."

What amounts to breaking door is not precisely laid down in the Books. I think the least moving of a fastener is breaking within the contemplation of the Law. If however an officer can get peaceably into the house thro' the door or window, he may break open chests, locks, or any inner apartments.

327.
1 Co. 72.
2 Bl. R. 823.

Robt. 62. 263. Palms 34.
Camp. 6-7. Comb. 17.
327. 84. 604.

X The second part of this is
breaking. The law of England
is in this case as if they
went on opening a window.

Sheriff

for the purpose of arresting the body or taking the goods of the defendant. But he has no right to enter there any other person without first demanding admittance to them: & then or should he may break - but he must not break without only

This privilege of the outer door & windows is limited only to the person, family & goods of the owner or person dwelling in the house & not to any stranger - As Mansion is his Castle & not the castle of B. If therefore B is in the mansion house of A & the officer is refused admittance he may break open the outer door &c - for the purpose of arresting him for. As house is no kind of protection to B. - These are the principal distinctions relating to this subject as to civil process - But Mr G doubts the propriety of this principle in any case & considers it altogether arbitrary there, not being the least shadow of reason existing for it at this time -

This privilege however extends to cases of civil process only & not to criminal - for if an officer has a criminal process, the mansion will not protect the criminal. Yet the officer in this case must first demand admittance before he has a right to break - Hence the peace of the family is as much disturbed as in civil cases & the house as much exposed to thieves & robbers - to rise in a prosecution for forcible entry & detainer which is of a mixed nature, partly civil & partly criminal - the officer is allowed to break open outer doors & windows

Sheriff

79

24th Aug 86

In criminal cases, there being no writ of habeas corpus, to justify the breaking of the door of the criminal house where a person has committed a known felony, every member of the community is a lawful officer to arrest him. But in order to make it a known felony the offender must be detected, playing a double role, as it is termed in the Books - An officer or any individual with or without warrant, may break open outer doors &c. for the purpose of arresting him, & even demolish the house if he cannot be taken without. But the officer breaks at his peril if he enters a house, whether with or without warrant.

4th Dec 456

So also may break, to suppress an affray, or to prevent a breach of the peace, either by an officer or private individual.

So also if the affrayers "escape" and are immediately pursued by an officer of the peace, outer door &c. may be broken open to arrest them.

5th Dec 91

4th Dec 455

But in one instance merely civil which is in a writ of seisen or "habeas facias possessionem" in ejectment the sheriff may justify breaking the doors & windows of the house, if admission is denied him, for the writ commands the officer to turn all persons out, & to put the Plaintiff into full & actual possession, consequently the sheriff has all power necessary for this purpose. And in this case the Law does not consider the house as belonging to the persons in possession, but to the Plaintiff in the process - for he has had a determination of the Court in his favour.

Sheriff.

18a 186

1 Feb. 698

To also in any civil process the door of a Barn not adjoining the house may be broken open, & W^g thinks however near it may be, if it be not a component part of the mansion house it may be broken open.

5 Feb. 182. 441.

14 do. 455

It has been contended that the store of a merchant is privileged, but W^g thinks it very clear that unless it is under the same roof with the mansion it may be broken down: that is, if there be no lodger in it.

Palm. 52. low, 182. 555

If the Sheriff's bailiff having entered the house lawfully, is locked out, the Sheriff may justify breaking the door open for the purpose of retaking him.

40 Nov. 456. 374. 288.

Palm 54. 182. 182.

138. 6 mod. 173

Also if a person having once been lawfully arrested, escapes into his house, it affords him no protection, for as he is an escapee, the outer door may be broken open to retake him. This point has been decided in England in a very strong case. A Defendant hired the window to converse with the officer, & the latter touched him, this was adjudged to be a good arrest, & the officer therefore justified in breaking the house to retake him.

28 Nov. 523

Expts. 605

The in ordinary cases an arrest made by breaking open an outer door or window of a house be illegal, yet if while in such illegal custody, the Defendant is fairly charged with another arrest, such last arrest shall be good, but there must be no fraud or collusion first to arrest the party unlawfully, & then to charge him with another action.

18 Feb. 78. 4 Feb. 456

1st Com. 370. 6 mod. 95

374. 290

By statute 29 Car 2^d chap. 14. & also by a statute Connecticut it is provided that no civil process shall be served on a Sunday - any civil process therefore served on that day is utterly void. The officer serving it, is of course guilty of

Sheriff - Escapes - Arrests. 81

False imprisonment, & the person arrested releasable by
Habeas corpus - The Court however will generally discharge
on motion in such a case

But where a person actually in custody, escapes
he may be retaken on Sunday; for the retaking is
nothing more than the means of continuing the official custody

Lecture 22^d

Of the Law of Escapes - an escape
is where a person being under a lawful arrest, &
restrained of his liberty, either forcibly or privately evades
such arrest, or is suffered to go at large before he is
delivered by due course of Law - Consequently to
constitute an escape there must be 1st an arrest;
2^{ndly} This must be lawful & 3^{rdly} it must be continued
So escape then is, evading lawful arrest. It is essential to
the existence of an escape that there be a previous legal
arrest. When therefore one evades an unlawful arrest
he is not in judgement of Law, an escaper -

Of the general nature of arrests. Every arrest in
civil cases must be made in pursuance of lawful authority
an arrest therefore without this authority is absolutely
void - It is in legal contemplation no arrest at all
The arrest need not always be under a writ or warrant,
as an officer may arrest a felon without it

4 Bac. 456 -

5 Mod. 95 -

6 do. 95 -

2 Ld. R. 1028 - 6 mod

95. 253. talk 626.

5 Ld. R. 25. 2 Bac. 245.

2 Bac 233 -

Bach 65. 64. 60.

Barnes notes 259 -

4 Bac 455 -

A peace officer may arrest one breaking the peace or committing a riot &c. But when a writ is necessary, an arrest made without it is void when not necessary it is good -

When an arrest is made by virtue of a writ or warrant, the general rule of the common Law is that, if the Court from whose authority the writ issues had jurisdiction of the subject matter of the writ, the arrest is lawful, of course to suffer the person thus arrested to go at large, is an escape - This rule obtains, tho' the process is irregular: all that is necessary is that the process should be absolutely void - There is a difference between void & irregular process - an irregular process may be set aside by due course of Law, & by writ of Habeas Corpus - But with indemnity an officer arresting under execution on the judgment & also detainer lie on the judgment under it is reversed -

On the other hand if the Court from which the writ issues, has no jurisdiction of the subject matter, so that the writ made under it is void, if so the Defendant going at large does not amount to an escape - the arrest is illegal & the officer guilty of false imprisonment. But in connection with this is a rule that the party arrested unless the process appears on the face of it to be void - In England there are dicta on both sides the reason is in favour of our rule - But to illustrate the former rule, suppose a single magistrate has issued a writ for an assault & battery, demanding

1 Stra. 509. 560. 64.
8 ad 141. ⁶ Mon. 27/11.
2 Wils. 384. 2 Brou.
234. Exp. 333. 391.
608. 607. 659 -

Kelly. 110. 182.
2 Salk. 387 -

more than 15 & returnable before himself - here
 it appearing upon the face of the writ that the Court
 have no jurisdiction of the subject matter, the writ will
 be void - But if the demand of damages should be \$15-
 or less & there should be a monomer in the writ, yet
 the officer must serve it, & the arrest will be good -
 for the Court has jurisdiction of the subject matter.
 I cannot find that the power has been withdrawn since the 18th of
 (an Act which has withdrawn the power of the Court to issue writs of Habeas Corpus)
 So Court of Common Pleas has ^{no} criminal jurisdiction
 So, if Court of Kings Bench issues process in real action, void.

This rule of the Common Law however is
 not universal, for there are certain cases where the
 Court has complete jurisdiction of the subject matter
 yet the process & arrest by reason of irregularity will
 be completely void, as if the process has no signature
 of a magistrate, or if it is not signed by the proper
 officer, or if the date is not being paid here the
 return is defective. If the date is being paid here the
 return is not being paid here the process is void, the prisoner is going
 at large is no escape. So if the writ overleaps a term,
 it being a rule that it must be made returnable
 the next succeeding term, if the time is sufficient
 between the date of the writ & that in which it is
 returnable - The reason why it is to be absolutely void
 is obvious, if it might be returned at any time after
 date it would place the defendant in a deplorable sit-
 uation, as he might be confined a long time before
 he could be in a situation to plead the irregularity
 of the writ in abatement. It follows then that

3 Wils. 341 -
 Esp. 328-9.
 1 Root 315 -
 Esp. 308-9.

Sherriff

the arrest is unlawful & the Defendant may sue the officer executing it the Plaintiff, or be released by Habeas Corpus — The rule laid down in the second third sentences under this head, is up to a good wit & therefore the three examples just mentioned as being exceptions are more properly qualifications —

In Connecticut, meane process does not usually issue from the Court applies to for meane — tho' it sometimes does, & always may — Most of the writs returnable to our County Courts are signed by a single magistrate, but where brought before single magistrate they are usually signed by those who hear them —

The general rule of Common Law therefore is not sufficiently broad to reach all arrests on meane process in our practice — The general rule of Common Law is predicated on the English practice where the same Court issue the writ that try it — So far as the Common rule extends it applies to ours — A Rule then adapted to our practice would be this — if the writ issues by a competent authority & made returnable to a Court having jurisdiction of the subject matter, the arrest under it, is legal & the going at large an escape — as if a Justice of Peace in the County issues a writ to be served in the County & returned before the County Court in the same County.

But on the other hand if the process is issued by incompetent authority, or returnable to a Court not

Having jurisdiction of the subject matter, the arrest is void & the person going at large is of course no escape. If the prisoner is resigned in the first case during the life of the execution it is no escape.

Let us suppose then an officer having under an arrest on some matter, cannot deliver him to a stranger, or that he told the prisoner in custody during his absence. If therefore the officer does attempt to deliver to this authority, he is clearly in an escape: for in contemplation of law when the officer has taken the custody of the prisoner, he is in the custody of an accredited officer of the law. The officer to be sure may command others to assist him in keeping the prisoner, but they must do so in his presence. This point has been recently decided in England; it is uncertain however what would be the decision here, if the question should arise. But it is presumed it would be different from that in England, in as much as our practice is directly in opposition to the principles established in this decision.

As things as has been observed, are necessary to constitute a good arrest. First, it must be in pursuance of lawful authority, & secondly it must be an actual & a regular arrest; or there can be no escape. The first of the two requisites, viz. that it must be made in pursuance of lawful authority, has been treated upon in the second & 3rd notes to the case of *the King v. the Sheriff of the County of Middlesex*.

1. There must be an actual arrest. Bare words will not make an arrest, there must be an actual touching of the body, or what is equivalent to it, a power in the officer of taking immediate possession of the body of the Defendant & his submission on his part, and therefore where the officer said to the Defendant he being at some distance, that he arrested him by virtue of a warrant he had against him, & the Defendant having a fist in his hand kept the officer at a distance, until he retreated into the house, it was held to be no arrest - But when the officer met the Defendant on horseback, & said to him "you are my prisoner" upon which he turned back & submitted, this was held to be a good arrest, tho the officer never laid hands upon him; but if on the officers saying those words he had fled, it would have been no arrest, unless the officer had laid hold of him.

If while one is under an arrest at the suit of A. in the custody of the Sheriff, a writ at the suit of B. against the defendant, is delivered to that officer, this delivery ipso facto amounts to an arrest on the last suit, or in other words he is considered in construction of Law as immediately in custody under B's writ. Therefore after such delivery the Defendant goes at large & may have an action against the officer for an escape - I do not conceive that this rule would apply

Eyl. 604. Talk.

79. Bull. N. 62.

Talk 586. 2da. 236.

Talk 79

Bull. N. 62.

53

9 Co. 84. Talk 254.

Madsen. 1852

in a writ of attachment, where goods, chattels or body are taken, as in the case of one species of writs in Connecticut wholly unknown in England, because if the person is ~~ipso facto~~ in custody under the second writ, the Plaintiff loses his election of choosing his security & the Sheriff his right of discretion.

III. An arrest must not only be actual but regularly and legally made. However generally speaking there can be no escape. Thus in all civil cases the arrest must be made by virtue of a legal writ or warrant: & if there is no writ or warrant the arrest is not legally made.

The strict rule of our Law also requires, that it be made by the authority of the officer to whom it is directed - viz. the officer must be in the company of the officer or person actually making the arrest. The officer is presumed to be in the company, if he is in pursuit of the same object & near the same place. But he need not be the Land which arrests, nor in the presence, or sight of the party arresting - as where the officer sent his assistant forward who made the arrest he being at some distance & out of sight. It is sufficient if the officer be near at hand in pursuit of the same object.

An officer is not liable for an escape of one who is arrested on a Sunday; for the arrest on that day in a civil action, being void, there can be no escape. - ^{in England} Process is mainly statute 24 Car 2, & also by Statute here. - Same rule obtains as to illegality by breaking open door or window. - there can be no escape for there is in Law no arrest.

Cowp. 614 -
Eyre. 604 -
2 Sa. 236 -

6 mod 211 -
Cowp 65 -

Cowp. 1. -
Eyre. D. 604 - 5 -
This point has settled -

A motion to discharge is not strictly juris. Consequently of the Court use their discretion to discharge or not, it is no evidence to prove that the process is legal or illegal.

Ld. R. 331. 2 mod.
23-4. 10 do. 251.
255. Bn. 236 note.

Yet there can be no escape when there has been a previous arrest, yet the officer is in many cases liable for not making an arrest. If an officer having a process in his hands, neglects to take the Defendant when he has an opportunity & he eventually evades an arrest, the plaintiff has a remedy against the officer by a special action on the case for neglect of duty.

Mole. Sup. 106-
360. 44 -
Blowd. 36 -

360. 52 -

Escapes are of two kinds, Voluntary & Negligent. Every person committed to prison is to be kept in safe & close custody. If then the Sheriff or keeper suffers the prisoner to leave the limits of the prison, even for a moment, he is guilty of an escape. A subsequent return of the prisoner makes no difference - the officer is still liable. He is guilty of a tort & nothing or post facto shall discharge the liability.

314. 415 -

no -

no -

A voluntary escape is one which takes place with the consent of the gaoler or of the officer making the arrest. If therefore a Sheriff arrests a person upon final process & permits him to go at large, before commitment & at the moment, it is a voluntary escape. In some cases the gaoler permits after commitment. Blackstone's definition is not sufficiently large for it includes only such escapes

as are from the prison, & not those before commitment.

3 B. 415 —

A negligent escape is one that happens without the consent or knowledge of the gaoler or officer making the arrest. The word knowledge however in this definition is wholly unnecessary; for such an escape may be with his knowledge & yet without his consent.

I. of Voluntary escapes. If a sheriff or gaoler admit to bail one who is not bailable by Law, he is guilty of a voluntary escape: And if the Sheriff or gaoler suffer the prisoner to step one step over the limits of the prison or the yard, but for a moment, altho he has a keeper with him he is guilty of an ^{voluntary} escape, even if the Sheriff himself be with him — for if he can permit him to go out of the limits for a moment, he may for a day or a year — If he can permit him to go a foot over, he may a mile or ten miles — The object of imprisonment on civil process is not for punishment, but a coercive mode for compelling the Defendant to discharge his Debts, & for this reason it is that 'is transgressing the limits of his prison is considered an escape. Imprisonment on final process is here contemplated —

1 Roll Abr. 806 —

3 B. 44. R. 36 —

2 B. 237 —

1 B. 24.

2 R. 176 —

1 B. 24. 26 —

If the officer after arrest on final process permits the Defendant to go out of his custody for a moment he is guilty of a voluntary escape; for if the arrest is

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is permitted to be interrupted for a moment it may be for a day or a year -

Meane -

Persons committed to prison on criminal process, are to be kept within the walls of the prison; but those committed on civil process, may on procuring security to save the Sheriff harmless, at his discretion, be permitted to go at large within the limits of the prison yard - which limits are fixed in each County by the respective courts of Common Pleas - and any slight transgression of these limits, will be an escape.

1 Sid. 13. Bull.

2 P. 72. 1000 72.

2 Bar. 232-9. -

11 Hy 137. -

It has been once determined that if a person confined on final process, is brought up by a Habeas Corpus ad testificandum, the Officer is guilty of a voluntary escape - This Mr G^r thinks one of the most remarkable that ever found a place among the reports. Monstrously absurd! Does not the Common Law clearly allow such a writ? Does it not compel the Officer to execute it? And can it then be possible that the same Law should adjudge him guilty of an escape in doing an act which he is compelled to do?

3 Kell 305.

Le R^d 241. 399-

788. 6 mod. 78-

600. 600. 14 -

But if the person who thus brings up a person on a writ of Habeas Corpus grants him any unnecessary or unreasonable leave or liberty, he is guilty of a voluntary escape - The rule in such case is, he must bring the prisoner into Court in the most convenient time & in the most reasonable way - ex. gr. If a writ is issued by the superior Court sitting in this County, to bring up a prisoner from a neighbouring one, he shall not

1 Bos. & P. 28

go on circuitous route when there is a direct one —
or he will be guilty of a voluntary escape —

vide infra

The same or a similar rule prevails where an officer has made an arrest on a final process & has no committed the defendant, but indulges him with an unreasonable time, here he is guilty of an escape —

1 Bos. & P. 24

2 S.R. 176

So also if after arrest & before commitment, the officer suffers the person to go abroad, with a keeper, he is guilty of an escape.

Plow. 17. 2 Da. 239

By the Common Law if the Sheriff manies a female prisoner committed on execution, he is guilty of an escape & she is discharged — for it is of no avail for him to attempt to prove that he has kept her in confinement all such testimony being inadmissible.

It has been decided that if Sheriff appoints a prisoner turn key, he is guilty of an escape, because he has put it into his power to be his own keeper —

1 Bos. 106 - 7. 127-8.

It has also been decided in the courts here that if a prisoner having the liberty of the yard, shows any disposition to escape or has once done it, it is the duty of the keeper to commit him within the walls; otherwise if he escapes it is at the peril of the officer — Notice of that disposition must however be given by the creditors to the Sheriff —

2 S.R. 131

The sheriff is never bound to grant the liberty of the goal yard, tho a bond of indemnity is offered to him: yet he may do it, it being a matter of mere discretion with him & if he does, it is at his own peril, & he must rely upon his bond of indemnity in case of an escape — There is a prevailing

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idea in the community, that the Sheriff is bound to grant the liberty of the year when sufficient bonds are tendered him; but there is no Common or Statute Law requiring him to do it, but as I before observed he may do it if he pleases, & hence the bond which he has taken is valid in Law.

Tho a bond to indemnify the Sheriff against a voluntary escape is not valid, the offence being a public one — He may also when he pleases commit the prisoner within the walls, & is not bound to give any reason for so doing — a bond given by the prisoner to indemnify the Sheriff is not valid.

An action for escape against the officer, his endorsement on the writ is sufficient evidence that the writ was delivered to him —

Comp 63. 65 —

Lecture 24th

Of negligent escapes — any escape without the consent of the officer is a negligent escape — Thus if the prisoner evades his restraint by fleeing from the officer without his consent, or by beating the officer, or using any violence towards him, it is a negligent escape — Indeed if the prisoner escapes in any way the officer not consenting, it is a negligent escape. There is in many particulars a difference between escapes on

3 M. 416 —

600 Jac. 419 —

Fitz N.B. 130

final process & on meane process. - If one is arrested on final process, & is permitted to go at large one moment the keeper is guilty of an escape - The jailer cannot take Bail; It must be done by the officer making the arrest and when he has once committed the prisoner, his power as an arresting officer is gone; he is *functus officio* and as the escape is voluntary, an immediate return will not bar the action against the officer, hence the Plaintiff's proceeding to judgement against the prisoner is now void of right to his action against the Sheriff or his jailer. Indeed this is the proper way, because it ascertains the debt due, which he is now to recover against the officer. In the case of a final process it makes no difference whether the Defendant is merely arrested, or whether he is committed actually to prison - It is in both cases an escape -

Salk 271 -
2 Wils. 294. -
Hkin. 582 -

But at Common Law a person arrested on meane process & not actually committed, may be permitted to go at large without making the officer liable, provided however he is forth coming at the return of the writ. Arrest & commitment on meane process are not the coercive means of satisfaction in an action of Debt for it is not known that there is a debt before the trial hence the

2 Bl. R. 1049. Salk
408. 2 Wils. 295. -
2 L.R. 172. 540 37

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2 M R 1049 -

3 M 415 -

Object of the arrest in mesne process, is only to ascertain the debt & to that end, to compel the appearance of the Defendant in the Court, or to give security for what may be recovered - Therefore if the Sheriff lets him depart, he is not guilty of an escape, until after a non est inventus is returned. - The difference

Kirby 209. 382. 434

2 Sup. 174. Stat. Con. 29.

between the Common Law & the Practice of Connecticut is that, here the Defendant need not be forth coming on mesne process even at the return day; for his non-appearance is a confession of judgement & it may then go against him by default: so if the Defendant appear & ready to surrender before non est inventus is returned by the officer it is sufficient.

2 Roll 49. 807 -

2 Sup. 174. 2 M R 294

Crabbe. 623. 652. 868.

In Connecticut then the prisoner on mesne process may go at large provided he is forth coming at any time during the life of the execution. But if the Defendant thus arrested on mesne process is not forth-coming during the life of the execution issued on the judgement, the officer is guilty of a voluntary escape - and at Common Law the officer is liable for a voluntary escape, if the Prisoner is not forth coming at the return of the writ.

Exp. 610. 3 M 582.

Salk. 271. 2 M R 294.

Stat. Con. 272

The two last rules hold only in cases where the person arrested on mesne process is not actually committed to prison, otherwise, if he is committed for the permitting him to go at large even for a moment is a voluntary escape - In Connecticut there is statute in affirmance of the Common Law, on this subject -

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Thus we see the principal difference between an escape on final & on mesne process is, that the former is followed up by a commitment, whereas the latter is not. — What will amount to an escape on final process before commitment will not on mesne process.

Where a person arrested on mesne process escapes, the plaintiff's remedy against the Sheriff is only by a special action on the case. Here the damages are merely presumptive, they not being designated by judgement, consequently are late proved. And a recovery can never be had against the officer, unless the Plaintiff in the process had a legal claim against the ^{party} ~~officer~~ escaping. — The acknowledgement of the Debtor may however be given in evidence. — In connection with this action, may be commenced against the Sheriff or any of the subordinate officers guilty of the escape.

Where one arrested on final process escapes Plaintiff has the choice of two remedies, by the Common Law an action on the case, or by two statutes Westminster 2. & Richard 2. an action of Debt against the Sheriff. — When the action on the case is brought the jury may give what damages they please.

Debt is the most eligible action for the Plaintiff, on account of the difference in the rule of damages in the two cases. — In an action of Debt the jury are bound to give the whole Debt & damages, or the Court will not accept their verdict, but in action on the case they may give what part of the amount claimed they please. — They may indeed give the whole sum claimed, but they are not bound to do so. — There are Common Law distinctions —

2 Wils 245. 60 C. 12.
17. 2 Wils 873. 2 B. R.
129. 4 do. 611.

1 Corp. Rep. 169 —
Crooke Cases 65.

2 L. R. 129. 132. 2 H. Bl.
110. 113. 114. 153. 2 W. Bl.
1048. — Exp. 3. 203 or 5.

3 L. R. 129. 2 W. Bl. 275.
Exp. 2. 609.

Sheriff

Stat. Con 366.
722

Statute of Connecticut seems to say that in any escape, either on final or meane process if voluntary, the whole Debt claimed shall be paid in any action, in civil cases. This construction cannot be avoided.

Lecture 25th

Of Rescues— If a person arrested on meane process, & not actually committed is rescued, the officer is excused; but if he be sued for an escape he may plead his return of a rescue in bar or by way of justification. And the reason given in the books, is that, on meane process, he is not supposed to have the præsumptio comitatus with him. But if a person arrested on final process is rescued,

3 Bl. 416—bro 494
Gro Dine. 873, Exp. 600
2 Ba. ab. 240—

It is no excuse to the Sheriff— for it is said that in serving final process he is supposed to have the præsumptio comitatus with him. I cannot see the reason for this distinction; why may you not as well suppose the præsumptio comitatus with him in serving meane as well as final process?

But if one arrested on meane process & actually committed is rescued, it is no excuse, unless the rescue be made by public enemies. A rescue by traitors & rebels is no excuse, for the Law will not presume that any power is greater than itself, the præsumptio comitatus is supposed to be near at hand. The goal is a place of strength & the Law will not admit the idea that it cannot resist robbers, violators &c.

1 Co. 34.² 11 Hen. 8. 2.
Exp. D. 610. Note.
808.

Thus in the case of Lord George Gordon's riot, it was found necessary to make a special act of Parliament, to save the keeper of the prison from the actions of the creditors, whose Debtors were set at liberty, thereby.

This rule obtains after Commitment whether the arrest was on meane or final process. If the arrest was on final process it holds equally true as well before as after Commitment. but in cases of meane process it holds only after Commitment.

Cokinam 610-
694. 6 mod. 211-
Hutton 98. Hob. 188-
Crawfay. 486. Exp. 659-
Gros. bar 77. 109-

In those cases of rescue where the Sheriff is not excused, the Plaintiff may sue either the officer or the rescuers. But I agree with Cokinam that if he elects to proceed against the rescuers, he waives his action against the Sheriff, because by commencing his action against the rescuers he asserts the Sheriff of his right of action against them. Further, it is in analogy with all forms of Law in similar cases; for it is a rule, that where a man has two remedies & selects one, he waives his right to the other.

The proper action against the rescuers is an action on the case; the some Books say either Trespass or case. This is not true, for case & trespass are never concurrent; & it is by fiction of Law that trover is concurrent with trespass.

Trespass vi et armis & Trespass on the case, cannot from their very nature, ever be concurrent. Trespass is founded on the possession but here the injury is consequential - therefore Trespass on the case is the party's proper action.

In an action against the rescuers by the plaintiff in the process the Jury may give him either the whole or part of the original demand laid against the party rescued - The true rule is, if it is made to appear that the original Defendant is not liable, so that a recovery may be had against him, the Jury are at liberty to give less than the original demand. If they give the whole, then the Plaintiff is satisfied, & cannot proceed against the rescuers; but if they give only a part then he may pursue the action against the original Defendant for the remainder.

Exp 694. 567. 8-4-
6 mod. 211 -

In all the foregoing cases, the party rescued is a good witness against the party rescuing, tho' particeps criminis, if the Defendant be found guilty, yet shall this go only to the credit & not to the competency of his evidence.

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Geo. Edw. 781. 16omb.
295. 1. 1. 25th
vent.
Lyer. 212. 2. 2. 175-

In an action brought against the officer for an escape on mesne process his return of a rescue is conclusive evidence in his favour at Common Law. tho if the return be false, the Plaintiff may have an action on the case for a false return. This return cannot be contradicted in any collateral way, except where by the pleadings it is put in issue.

At Common Law, when the return of the writ is good upon the face of it, its defect cannot be pleaded in abatement. In Connecticut they permit the official returns of an officer to be contradicted by parol evidence. So that Wyl. supposes that the former rule does not apply here, as officers returns are not conclusive upon the Plaintiff.

If however the Sheriff return a rescue & upon this return he recovers from the rescuers, they may, in an action against the Sheriff for a false return, prove that there was no rescue.

Hutton 48. 100. 130.

Qu. Bar. 77. or 109

606. 100. 400. 299.

The Sheriff may have an action against the rescuers only in cases where he is liable over to the Plaintiff for a rescue then on mesne process he cannot maintain an action against the rescuers as in this case he is not liable over to the Plaintiff.

Ex. 610. 1. 482.

If a Sheriff brings out a prisoner on a writ of Habeas Corpus a rescue is no excuse because he might have assisted the bona comitatus.

1 Roll. 808. 460. 842.

450. 789. 240. 113

2 Br. 247-

It is a general rule, after a person arrested on mesne or mesne process is committed to prison, nothing but the act of God or of the public enemies will excuse the sheriff in case of escape. It is laid down in Bacon's Abridgement that fire will excuse him but this is not Law for a great weight of authorities is to the

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found in contradiction to it. This seems also to have been the idea in Parliament at the time of the great fire in London in 1666, for they conceived it necessary to pass an act excusing the Sheriff from all liability to Creditors for such of their imprisoned Debtors as were set at liberty by means of the fire.

This point has recently been determined in the Supreme Court of the State of New York, who held that the fire occasioned otherwise than by lightning will not excuse the Sheriff.

Of the difference between the consequences of
a Negligent and a Voluntary Escape.

It was anciently holden that in case of a voluntary escape on final process, the Prisoner was forever discharged, so that the Plaintiff in the process could have a remedy only against the Sheriff. This is now decided ~~not~~ to be so clearly in not Law - for the Plaintiff, as the nature of the case may require, may have a new action of debt against the Defendant; that is, an action of debt founded on the judgment on which he was originally committed, or a *scire facias* upon this a new execution; or by the Statute 1849 William 3^d he may have a new execution without a *scire facias*. or if none of these proceedings are necessary, he may retake him on the old execution.

If the Sheriff permit a voluntary escape when the Defendant is arrested on mesne process, the Plaintiff may have him retaken by an escape-warrant issued by a magistrate, or directed to any person, tho the Officer cannot. The reason why an escape-warrant is necessary, is that the original process must be returned to Court.

Rob. 202 -

2 Pl. 294. 106 176.

Rob. 66. 1 Pl. 330 -

1 Cent 264 - 1. 2nd.

136. 3 Pl. 415 -

Cap. 611. -

Waller. 1 Pl. 619 -

Cap. 611. 2 Pl. 295.

5 Co. 52 $\frac{6}{11}$ -

Sheriff

But if the Sheriff is guilty of a voluntary escape or a fatal process, the Plaintiff may retake the Defendant on the original execution itself, for in this case it is not necessary that it should be returned or he may have a new execution, or have a writ Faciās; or he may have an action of Debt against him which last is frequently preferable, because in this he may recover interest on his execution, whereas in the other cases he cannot. Mr. G. thinks in neither of these cases escape warrants an execution. The usual practice here is for the plaintiff or keeper of the prison immediately to pursue the escaper with or without the process, or advertise him & have him arrested, in which last case any one may take him under the advertisement or he may pursue both modes at the same time.

360 52. 2. 2. 176.
Ga. 212. 1. 2. 269.
1. 330. 3. 16. 416
3. 16. 415

In all escapes which are voluntary, the officer permitting the escape cannot retake the escaper, for he is 'particeps criminis' and besides it is a settled maxim that no person shall recover against another in an action where the ground of that action is a wrong done by himself. Therefore he can have no action against him; "et dolo malo non vitetur actio". Indeed if after a voluntary escape the sheriff or gaoler retake the prisoner he is guilty of false imprisonment.

And this is a clear rule of Law that a bond taken by the sheriff to save the sheriff harmless from the consequences of a voluntary escape is void; as being against Law for it is an universal rule as applied to contracts that an undertaking to do an act in violation of Law is utterly void.

3. 16. 416. 1. 17. 120
Ga. 212. 2. 34-53-
360 52. 1. 1. 45-6.

When the escape is negligent the Sheriff may retake the prisoner, or he may have an action on the case against him because he is immediately liable over to the Plaintiff in the process.

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West 151.
Case Law 349. Corp 613

and this the Sheriff may do before action brought against him - In this case if a bond has been given to the Sheriff to secure him, he may recover upon it, for it is allowed to be good in Law. The Plaintiff may retake the prisoner if he pursue his remedy against the Sheriff & recover less than his demand - at Common Law the Sheriff cannot recover if he has suffered a voluntary escape cannot recover against the Defendant, altho he is liable to the Sheriff - He is not known in Law. It has been decided in Connecticut that a person escaping from arrest in this state into another, may be retaken on an escape warrant issued in another state, backing an escape warrant issued ^{vide p. 26.}

West 167 -

If a person arrested on Criminal process escapes he is guilty of a misdemeanor & punished for the escape by fine & imprisonment. The reason is, he is bound by the Law; & if he break prison to escape, he is guilty by Common Law of Felony -

2 Hawk 26. 122. 128 -

4 Bl. 129 -

Lecture 26th

If an officer after having arrested a felon suffers a negligent escape, he is guilty of a misdemeanor & punishable by fine.

But if he suffers a voluntary escape, when the prisoner is a felon, he is a sort of accessory after the fact & is liable to suffer the same punishment as the felon would have suffered - viz. If the felon is guilty of murder, the officer shall be hanged.

4 Bl. 130 -

1 Hawk 599 -

2 Hawk 134 -

Sheriff

When one has been convicted to pay the whole or part
of a debt, duty of another to pay the whole or part
the original process.

as a murderer: This however is to be remembered that the
officer cannot be punished in this manner until the guilt
of the offender is ascertained by Law & sentence passed upon
him; for it would be highly unjust & improper that an
accessory after the fact, should be punished for the crime
of the Principal, when that crime is not ascertained by due
course of Law. He may however before the conviction
of the Felon, be prosecuted for a misdeemeanor & be
punished by fine & imprisonment.

If a Sheriff after having suffered a negligent escape
has been compelled to pay the debt owing to the Plaintiff in the
original process. He may maintain an action of indebitatus
assumpsit against the escaper, as money laid out and
expended for his use. - In case of voluntary escape not well settled that Sheriff ^{can recover}

If after a negligent escape, the Sheriff takes
the prisoner on fresh pursuit, after action brought
against the Sheriff, the liability of the Officer to the
Plaintiff in the original process is discharged. The
principle is this. The body of the Debtor is a pledge to
the Plaintiff for the security of his debt; it is all the
Law can give him, & consequently he can suffer no
loss if the Debtor is again in Custody before action is brought.
Thus, after having once escaped, if he escapes again it
is voluntary & the Sheriff is liable. - "Upon fresh pursuit" does not
mean immediate pursuit - but a taking any time before

2 Wm. 908. 3 Co. 44
2. 2. R. 176. 2 Vent.
2 H. 217. 60 D. 60 P

Black 106 -

action brought against him.

1 D.R. 126 -

1 Vol. Stat. N.Y.

In England the retaking must be pleaded specifically, cannot be given in evidence under the general issue, because it is inconsistent with that plea - In Connecticut & New York it may be given in evidence under the general issue by giving written notice, &c.

6 Cr. Bl. 657. Ann 873.

3 Co. 44. C. 6 H.

6 Cr. Bl. 657. 3 Co. 52.

If an action is brought by the Plaintiff against the officer before the recaption, a subsequent recaption does not discharge him for the Plaintiff by commencing his action attacks in himself a right of recovery & no subsequent act of the Sheriff can avail him of his right -

2 D.R. 126. Conyn
Rep. 554. 1 Bos. & Pul 413

But a voluntary return of the prisoner into custody before action brought by Plaintiff against the Sheriff is equivalent to a recaption on fresh pursuit. As the effect produced in both cases is the same.

3 Co. 52. 2 Wils. 294.

Supr. 6 H. 612.

2 Vent. 299 -

In case of a voluntary escape on final process a subsequent recaption does not discharge the Sheriff from his liability to the Plaintiff; for he has no right to release the prisoner & if he does, he is by the very act guilty of false imprisonment - He is guilty of a crime & can be no satisfaction to have him release the prisoner; on the same principle, a voluntary return of the prisoner will not discharge the liability of the Sheriff; as this is only equal to a recaption on fresh pursuit. But ^{by Stat. N.Y.} he may release by cap. a co. sc.

2 Wils. 294 -

When there has been an arrest on process this rule does not apply. The reason is the person is not arrested in this case, for the purpose of compelling him to pay the debt - Consequently if he pleases may let him go. ^{Secs of} he once imprison him - (by Stat. N.Y. 1841)

1 Sheriff

A subsequent agent of Plaintiff in the process to the party, escaping will not hinge the voluntary escape but the Sheriff probably sometimes & he may intend on the prisoner may be taken by the plaintiff in the process. The reason for this is evident. It is a hard release, which never discharges the right of any action - a hard release does not even discharge a hard contract. The Sheriff may take him, on a negligent escape for his own security for he does not discharge the person.

When a person has been committed to prison on an execution, the Sheriff cannot receive the money due on the execution & discharge him & if he does he is guilty of a voluntary escape. The reason assigned is, that the Law does not recognize him as the agent of the Plaintiff to receive the contents of the execution. He has no right to receive the money - It is the duty of the Sheriff to keep the prisoner in his custody until he is delivered by due course of Law. It is however a question whether if on an action brought against the Sheriff he should pay the money into Court, together with the lawyer's costs the proceedings would not be stayed. - Well - Thanks they would -

A sailor who has a prisoner

See also 404 -

1 mod 194-8 do. 225

336 -

2 Sheriff.

Ma. 908 -

Exp. 3. 611 -

in custody may retain him until he has paid him his fees. But if after a negligent escape this prisoner is discharged by the Plaintiff in the process, the goaler cannot retake him for his fees - and this is reasonable, for by his own neglect he has lost it - in which case the Law will not give him this summary mode of recovery -

1 Mod. 106. 4 -

If a prisoner having the liberty of the yard escapes without the knowledge of the Sheriff, he may on first pursuit retake him, & if he does this, before action brought or if the prisoner voluntarily returns, the liability of the Sheriff is at an end. In these cases the Sheriff may recover the bond of indemnity which was given for the prisoner abiding a true & faithful prisoner - The damages however will be only nominal - unless such damages are properly taken

But after the prisoner has thus escaped from the limits of the prison yard, neither he nor his bondsmen can compel the Sheriff to receive him again into custody, tho he may visit if he pleases, & the reason is that he has been guilty of a wrong & only set himself to law.

1 Mod. 151 -

It has been decided in Connecticut that after the action against the Sheriff is barred by the Statute of Limitations 2 years the Sheriff shall not recover more than nominal or special damages in an action over to the Plaintiff in the process -

The Comorers may therefore be sued by writ *audita querela* against the Defendant in a judgment recovered against him for the escape of a prisoner, where the original creditors right of action is barred against the Sheriff by Statute of Limitations

Sheriff.

1 Vent 211. 217-

2 Bos. 248. 2 T.R. 126.

Under a Court for a voluntary escape against the Sheriff the Plaintiff may give in evidence a negligent escape - That will support the declaration - And the defendant on his part may plead to voluntary escape any defence that he might to a negligent escape, & this without traversing.

This mode of pleading is not used in Connecticut a voluntary escape is here declared on as such & a negligent escape, as such.

Ct. 612. Com. 403-6.

For a voluntary escape the whole Sheriff or gaoler is liable as well as the Sheriff himself, but for a negligent escape the Sheriff only is liable. The rule is the same in England as to Sheriffs & their deputies.

Ct. 612-

If then the Creditor or Plaintiff in the execution sues the gaoler for a voluntary escape as he may do, the Sheriff it seems is excused.

8 Co 122. 143^b

Hob. 209. 3 mod 325-

If after an action of Debt brought against the Sheriff for the escape of a person committed on execution & before plea pleaded, the original judgement on which the escape was committed be reversed, the Sheriff may plead nil tunc record & thus save his liability.

But after judgement actually reversed & execution issued against the Sheriff, a reversal of the original judgement will not release the Sheriff from his liability.

* Plaintiff must avail him of the distinction between voluntary & negligent escape in his replication by way of novel assignment.

Lecture 27th

Of False Returns - If a Sheriff makes a false return he is liable to an action on the case in favour of the party injured. (but this rule holds true not only to the Sheriff but to any public officer acting under him)

If the Sheriff makes a false return, when he has actually made no service on the Defendant the latter may maintain an action against him: at Common Law the writ is always directed to the Sheriff & to him only - & in his name only can the return be made -

In Connecticut when a false return is made the Defendant may plead it in abatement. & the Plaintiff suing in this case the superior party, may have an action against the Sheriff for such false return -

If the Sheriff makes a false return, non est inventus upon execution or any process the plaintiff may bring an action on the case against him - the governing rule on this subject is that "in all cases of a false return the party injured whether Plaintiff or Defendant has right of action against the officer making such false or illegal return -

As to escapes the insufficiency of the jail a Statute of Connecticut has there introduced a rule unknown to the Common Law. Thus if the prisoner escapes this such insufficiency, the County & not the Sheriff is liable - the reason is, it is the duty of the County to build & to keep jails in repair - In England this is the business of the Sheriff - Under this statute remedy is not had by

14th. 356 -
Exp. 615 -

See Sir. 729 -
Chas 650 -

Stat. Con 223 -
Book 450 -

Sheriff

Kirby 318-
Root prison -

action at Common Law, but by a petition to the Court of Common Pleas in the County where the goal is - The reason is, a Court is not such a corporation as can be sued, & the petitioner if he feels injured may appeal to the superior courts - In general the liability of the County under our Statute is nominal only, for it has been decided that if the prisoner escaping is responsible the Plaintiff must pursue him & not resort to the County & if he is not responsible the creditor can have nothing by the case, therefore the County ought to be only nominally liable & indeed special damages are able that are given - These decisions Mr. G. thinks (or at least not) are contrary to principle - There is one class of cases in which Mr. G. thinks the liability of the County is substantial - Thus when the person escaping is responsible, but by means of his escape defeats the Plaintiff's remedy, which would otherwise have been effectual - Here the County would be liable for the whole Debt - If the man escapes and is caught at last.

The Sheriff as well as the County is liable for an escape - Thus the insufficiency of the goal if the escape was actually facilitated by any act of himself as goaler -

Here follow Miscellaneous Rules

If a creditor voluntarily discharges a Debtor taken in execution from custody, whether committed or not, he can never afterwards retake him, nor enforce his judgment!

4 Burr 2482 - His ipso facto a liberation of his demands. The
 Str. 653. 12 R 537. reason is, the body is deemed a satisfaction for the
 6 R 525. 7 R. time being, & the creditor by discharging him has
 420. 8 R 123- relinquished all further claims - And the rule is so
 inflexible, that altho the discharge in Custody was
 made in consideration of some new promise or
 undertaking, which the Debtor has broken, the creditor
 cannot recover his money - He cannot retake him
 on the execution, nor can he maintain an action
 on the new promise (but will on a bond taken for this
 purpose) nor can he enforce the original judgement,

yet an action of assumpsit will lie on the new
 promise, if for a specific thing. If there be informality
 in the instrument given in consideration of the discharge
 the discharge is irrevocable & the debt entirely lost and
 it is now settled Law that a bond conditioned that in
 certain events the Debtor should be returned again into
 custody, is void, as against Law -

If two joint Debtors are taken in execution & one is
 discharged from Custody by the Creditor the other is discharged
 also - The reason is, that while the body is in goal, 'tis a
 satisfaction for the Debt, & when discharged by the creditor
 the Debtor is discharged - Now as a release to one is a release
 to both, consequently a voluntary discharge to one is a
 discharge to both - & to detain one is false imprisonment -

But under the Law merchant the holder of a bill of exchange
 or a promissory note, after having taken one indorser in

4 Burr 2482 -
 6 R 525 -
 11 Bro & Bul 242 -
 2 East 243 -

1 Fentl. 48. Lick 574 -
 12 R 640. Bro. Co. 351.
 5 Co 86^{1/2} -

2 B & R 1235. 2 Hume 281.
 4 R 325. 6 Lick 1246.

The 11th.

Execution & release him without actual satisfaction
 Conty 155. 1812 - may sue another & take him in execution & so on until
 he obtains satisfaction or has sued the whole - But in this
 case it is to be observed, that the Indorsers are not Joint
 Debtors; for they are distinct & independant indorsers -
 each one is a new drawer of the Bill - & W & suppose
 if they were Joint Debtors, the Law Merchant would give
 way to the Common Law.

600. 52 -
 Bro Wils 850 -
 120, ac. 136. 133 -

560, 850. Bro W. 850.
 But supra -

It was decided in the reign of James the 1st in the
 time of Lord Hobart, that when a sole Defendant confined
 in goal on execution died there, the Debt was forever extinguished.
 One reason given was, that of two remedies to which the Plaintiff
 was entitled, he had chosen one, & therefore had waived his
 right to the other - If this principle had been carried to a greater
 extent, it would have followed that if one of two joint Debtors
 confined on execution died in prison, it was a discharge of
 the other - It was however soon afterwards decided that this
 was not a discharge to the other -

But this rule was never agreeable to the Common
 Law, for it is in no way analogous to a person's having
 two remedies given him, & then by electing one to waive the other.
 The imprisonment of the body is deemed a ^{security} ~~main~~ security for the
 payment of the Debt - If therefore the prisoner die without
 the fault of the Creditor the latter can never be considered
 as having waived his remedy of the Debt, which it was intended
 to secure - By the Statute of 24th Jac. 1st it is declared & provided
 & enacted that where a sole Debtor die in prison execution
 may be sued out against his estate - & the Defendant had

110. 354. July 183

Sheriff.

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been confined by force of an issue before. This statute is declaratory of the Common Law & recognized by our Courts.

Sheriff has a right to take bond to keep prisoner till fees are paid, or discharged by due course of Law.

By statute 23 Henry 6th a statute against covin. It is declared, that a bond given by the prisoner that he will remain a true prisoner, until all the fees & expenses of his Court be are paid is utterly void. The object of this statute was to avoid all oppressive contracts between sheriffs & prisoners. This statute has generally been considered here as in affirmance of the Common Law. There is a difference between an instrument which is void by Common Law & one which is void by Statute, by the latter, void in toto, by the former good as to the residue. I can see no reason for this distinction. Our Courts here never considered it.

10 Co. 100^b
How 68th vol. 144.
2 Wils 351. New Co.
173. 10th Wms 195.
10 mod. 139
1 Root 158.

Section 23rd

Statute regulations in Connecticut, Goals and Goalers.

The Law relating to them has already been treated of in a great measure under the general title of Sheriff. What has not remain, now to be considered.

A person legally committed to prison for any offence is by our Law obliged to bear his own charges & the expenses of commitment, if he has means. Statute, so to do. If for this purpose his estate is subject, if he has any. But if he has none he may be assigned in writing under the direction of the Court till he has paid it. And if he has neither means nor ability to pay, & cannot labour, he is to be

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must be paid out of the State treasury - If the gaoler
 takes fees from any person greater than allowed by Law
 he is liable to treble damages, & fines at discretion of the Court.
 When a person is committed to goal in any civil case he is
 obliged to bear his own charges, unless admitted to the poor prisoners
 oath - which is that he has no estate to the value of \$17, nor so much
 as to pay for sure for which he is imprisoned - upon
 his taking this oath he is discharged from prison unless the
 Plaintiff furnishes him a weekly maintenance of 12 mor -
 which is deposited with the gaoler - In criminal cases the pris-
 oner is never allowed his oath - his estate if he has any, is if the
 sure after acquies any is liable for his expenses then execution
 for the same obtained by scire facias - Therefore the oath can
 be administered (in civil cases) the creditor must be notified & say
 he administers to appear & then cause a by the oath should not be adminis-
 tered - & if no sufficient reason appears, any magistrate administers
 the oath - If the first application is unsuccessful, he cannot make
 another application except to two magistrates, or a house one much
 be a chief justice of the court & a justice or two justices quorum unless
 who have power to order the allowance to cease. When the creditor
 furnishes a weekly allowance it is added to his debt & prisoner
 cannot be discharged without satisfying debt & expense; & while he remain
 it is an accumulating sum - eventually to be discharged by the Debtor -
 Debtors & Debtors are not to be confined in the same apartment. If the
 keeper is liable to pay treble damages - This is also a law rule
 When any country is destitute of goal, prisoners may be sent to the next
 adjoining county & there be retained until goal is provided in his county
 County courts have in their respective counties authority, to order into
 close confinement all debtors confined for debt, damages, fine or costs
 on execution of the debt exceed \$17 - Sheriff may do this as his pleasure
 but if the County Court orders it Sheriff must obey if he does not he is liable for
 a voluntary escape - When taken from prison Court -

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Lecture 28th add by Kensington Review July 15th 1809.

I shall first consider the rights & duties resulting from the relation of Husband & wife - &

1 Bl. 433

1 Bl. 422

1 Inst. 351.

2 Bl. 435

1st This relation is considered by the common Law & by our own as a civil contract. To many purposes husband & wife are but one person in Law. Hence by the rules of the common Law all the personal property which the wife has in possession at the time of her marriage, becomes the sole & exclusive property of the husband.

The general principle by which the Law is to this branch of the subject is regulated is founded on the husband's duty to maintain & protect the wife; & hence state so far as this only is his - in order to enable him to discharge the burden into

The husband by marriage obtains a power over all the debts & contracts, & all choses in action of the wife; but does not acquire an absolute right to them. He obtains a power of collecting all her choses in action, & if he exercises this power & reduces the choses to possession, during coverture he acquires an absolute & indeefeasible right to them. But if he does not, & the coverture is dissolved by the death of himself or his wife, all her choses in action will be revested in her or her representatives.

3 mod 186 -

386. - Chitty 110 -

Sta 116. 3 Mod. 55 -

1 Bl. 515. 1 Kdl. 342. -

None 352. 1 How. 25. -

1 Ba. 247. -

Co. Litt. 351. -

1 Com 555. 1 Ba.

289. Co. Litt 351 -

During coverture, the husband having absolute right wifes personal property, he may dispose of it at pleasure, he may bequeath it - But if he dies intestate before the wife it goes to the executors or administrators of husband (Paraphernalia 1st kind. - Port.) He has however no right to personal property which wife holds in her own right.

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1 Com. 545
1 Ba. 292. 2. Ex. 127.
1 Ark. 114

So also husband is entitled to the personal property of the wife acquired during coverture - e.g. Legacies - To the avails of her labour.

2 Ven. 64. 11 Vin. 40.

Settlement of husband on wife is said to be an absolute purchase of all her choses - So that he not only has them if he survives but if he dies first they go to his representatives - unless an express or implied agreement to the contrary

1 Red. 337. 1 Ba. 293 -
1 Com. 546. 1 Moore 177 -
3 Keble. 114. 11 Vin. 396 -

If obligors of the wife be sued, husband & wife are joint tenants of the judgement

3 L.R. 94. 2 Ark. 208.
420. 18 How. 308. 30 M.
199 -

If either dies before collection the jus accrescendi in England, the rule in Connecticut, vests absolutely in the survivor - But in Connecticut the right of collection is in the husband subject to accounting if he survives as in case of partnership right - Husband may assign her choses in action for valuable consideration. See not 2 Ark. 208. 18 How. 308.

1 Holt. 349.
1 Com. 545.

Wife not liable to husband's debts after his death nor to be taken in execution while he survives.

1 Ba. 287. 114. 172.
1 Moore 25. 1 Keble. 261.

Goods of a feme sole, in possession of another either by bailment or finding, are on her marriage absolutely vested in the husband & he may sue for them alone -

3 L.R. 631

1 L.R. 172. 30 M. 631

After if the conversion or other injury be before marriage it is a question however whether in the first case, husband can maintain Trespass alone - Determine he certainly may

18 How. 257. 2 Ven. 264.

Voluntary conveyances of property by wife, before marriage have sometimes been adjudged fraudulent as against husband, e.g. a woman on the point of being married makes a conveyance voluntarily to a mere stranger - See if made to provide for her children by a former marriage

1 Vern. 408. 20 M. 353.
1 Ark. 265. 18 How. 280. 705.
1 Ba. 292.

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2^d of Wifes Chattels real. over then the husband by manage
acquires a right similar, tho in general more extensive than to her
chose in action & personal property

2 Bl. 386

The husband may dispose of the wifes chattels real, &
thus make the property absolutely his own - So he may sue
in ejectment in his own name in right of his wife, and
recover a term for years, & this makes it absolutely his own.

1 Inst. 46

The husband cannot dispose of wifes chattels real by devise:
but if he dies without having disposed of them they survive
to the wife. In these respects chattels real are analogous
to choses in action. But in the following respects they differ -

Chattels real ~~survives~~ to the husband, & become his absolutely
if he survives his wife. So they may be forfeited for his out-
lawry or attainder or seized upon for his debts. But if there
is judgement against the husband execution cannot be
sued out against the term after his death: yet the husband
may make a lease of the wifes chattels real, to commence
after his death. And if he makes a lease of a term for years
in right of his wife, his representatives are entitled to the
rent, tho the wife survives - But if the lease made by the
husband did not comprehend the whole term, the residue of
it survives to the wife.

1 Inst. 46. 351.

2 Com. D. 81. 1 Roll.

341. Bro. Cha 418

1 Vern. 278

Geo Eliu 287

Poph. 5

1 Inst. 46

2 Com. D. 82.

1 Vent. 287-8

If a feme sole being joint tenant of a chattel real,
marries & dies, whole goes to the surviving tenant.

an assignment of a lease to a feme covert, where husband has not refused his
assent, is sufficient: for a feme covert is of sufficient capacity to purchase of others
without the consent of her husband; & tho he may disagree & direct the
estate, yet if he neither agree nor disagree, the purchase is good. Bursfather
vs Gibson, Doug. 451. Co. Litt. 3. c. 356. b.

Baron and Ferne.

Of the Collection of the wife's Choses in action.

- 1 Nels 396 — The husband cannot sue alone for debts due to the wife
but must join his wife in the action
 3 Atk 20. — before coverture; the reason of this is, that the husband
 does not acquire a right to the wife's choses in action
 1 Mod 179. — until they are collected. But should he sue & recover
 3 de 189. — judgement in his own name & then die, his executor
 1 Sid. 337. — might in other cases, take out execution upon it; but
 as the wife is joined if the husband die, before collection
 1 Moore 179. — is completed, execution will survive to the wife
 that such judgement should survive to the wife in
 case of the husband's death, seems perfectly natural, for
 the chose has not been reduced to possession of the husband.
 On what principle then does it survive to the husband, at
 the death of the wife? It is simply this; the judgement
 was joint & the paramount rule of ius accrescendi
 takes place in this case; but it survives to the wife on
 another principle, viz; that the chose has not been reduced
 to possession — Now on this subject questions may arise in
 this state & other of the U. S. Here we have totally abolished
 the ius accrescendi merely by custom without any statute
 in other states there are statutes for this purpose — If then the
 principle upon which a judgement survives to the husband
 is the ius accrescendi I am confident it is here that
 is abolished, a judgement obtained in the name of the
 husband & wife will not survive to the husband.

The reason why the chattels real of the wife survives
 to the husband when he outlives the wife I do not know. Some have
 endeavoured to make out the reason by calling the husband & wife

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Joint tenants or quasi joint tenants of the chattel real.
But this is absurd. In a joint tenancy, the owners must have one & the same title, commencing at the same time, by the act of the parties. Since there are the qualities essential to a joint tenancy it is absurd to call the husband & wife joint tenants. The reason then why the chattel real of the wife survives to the husband is ita lex scripta est. And since it can with no propriety be said to descend on the per accrescendi of joint tenancy I conclude our Law in this respect to be the same as the English.

In our Country hardly any chattel real are known but leases for years. In England lands extend an also chattel so long as the creditor retains possession of them.

If the husband mortgages the chattel real of his wife he has an absolute right in the equity of redemption. But if the husband & wife mortgage it, & the husband redeems & dies the wife shall have it. It has already been observed that if the husband makes a lease of wife's land, chattel real, & the lease does not extend to the whole number of years, the reversion goes to the wife & the rent during the continuance of the lease made by the husband, goes to his representatives. This may seem to be contradictory to a rule sometimes laid down, that rent follows the reversion. It is true that rent follows the reversion in fee, but it is never true as it respects a less estate.

If the wife is possessor of a chattel real, but is under of the possession, but the husband does not reduce the possession during coverture, it will not survive to him at the death of his wife. This depends upon a technical rule, that land reverts to the person last seized.

"Secundum facit suppositionem"

2 Com. 381. 2. 3.

1 Roll. 144.

Moore 396.

1 Roll. 347.

1 Roll. 344.

Rec. Chan. 418.

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1 Inst 351. 384-11.
 - 2 How 28.
 - 2 Atk 87. 420 1 do. 92.

If the wife is possessor of chattels real in action doct. as
 Executor for instance; they do not survive to the Husband.

The husband (as before observed) may assign wife choses
 in action for valuable consideration, but not otherwise & it
 binds the wife. The reason I suppose is, that if he assigns for
 valuable consideration the assets come to the benefit of the
 family - I find nothing in the Books however to this point
 but I apprehend that his assigning the chattels real of his wife
 or in other words disposing of them without consideration
 would have the same rule as there is the reason for it -
 The rule however is plainly a rule of Equity -

But the husband may release a bond, ^{the wife} without
 valuable consideration.

2 Atk. 208.

With respect to husband as administrator over
 wife's choses in action - vide succeeding text -

By the Statute 22 Charles 2 the husband when he
 administers on wife's estate, is bound to pay all the debts which she
 owed before coverture. provided she left assets sufficient to
 & if any thing were left he is bound to distribute it, same as any
 other executor, to her next of kin: But by statute 29 Charles 2
 the husband is allowed to retain the surplus of wife's assets
 after having paid her debts, without distributing to next of kin
 In Connecticut there is a statute similar to the first & here I think
 the husband would be liable to distribute after paying the debts -

Moore 522.

I should have observed in the proper place, that the husband
 cannot release or assign a wife's life annuity, so as to bind her longer
 than his own life for his real estate, an incorporeal hereditament.

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Lecture 29th

Of the wife's real Estate of Inheritance

The husband has the sole usufructuary enjoyment of the wife's estate during coverture. But at Common Law he cannot alien alone - this not being necessary to give effect to the governing principle.

Nor can husband & wife by their joint

act, alien her inheritance, except by fine or recovery -

According to English practice - this is different here by Statute.

By Statute 32 Henry 8th Husband & wife are enabled to make leases of her fee simple or fee tail for 3 lives or 21 years if husband grants larger estate than for his life

in wife's lands, no forfeiture occurs, as in other cases of particular tenants - at most it will enure only as a grant for his life; possibly for less, as the wife may die & he not be entitled to the Countess

On his death it reverts solely in the wife, & on her death the fee vests in her heirs - But the husband in case of a child born alive capable of inheriting, has an estate in the whole of which the wife died seised, by the

Countess of England -

In Gavelkind tenures the husband has Countess without having children or lawful issue - The Connecticut version of Laws by charter of Bar. 2 was according to Gavelkind. But this kind of Countess was never adopted here & since the Revolution it has by Statute been declared alodial

1Ba. 286. 300. -
1Ba. 11. 1Roll. 347.
2Inst. 570. 1060. 42.

1Ba. 301. 2Inst. 575 -
1Ba. 444. Litt. 2069. 74.
Stat. Con. 265

1Ba. 309. 10. 1Ba. fac.
22. 378. 560. 7.

Litt. 204. 415. 2Ba. 278
274. 960. 140. 1Ba. 301.
2Inst. 681. 60. Litt. 326

1Ba. 301.

2Ba. 126. Litt. 35.
52. 1Ba. 659. Litt. 30.

2Ba. 128. Litt. 30.

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2 M. 127

There is no Countess in Remainders or Reversions

2 M. 127. Co. Litt. 29.

2 M. 127. Co. Litt. 29.

8 Co. 35. 1 Ba. 659. 666.

Plow. 263. Co. Litt. 29. 30. 1 M. 127

2 M. 28. Co. Litt. 30.

The seisin of the wife must be an actual seisin or possession; except in the case of some incorporeal hereditaments — The marriage must be legal;

& the issue must be born during the life of the mother. By the birth but supra he is tenant by the County initiate; & the title is consummated by the death of the mother.

Formerly tenants by the County, in Con-
-suetudine were tenants only during the minority of the issue. But then the husband was not curtailed by collateral heirs — These decisions however depended on usage, & there has been no late confirmation of them; indeed it is now settled that Tenant shall hold by the County during his natural life —

4 Co. 57. Co. Litt. 162. ^{an}

351. 2 M. 435

At Common Law, the arrears of rent, due to the wife while she was a feme sole, would not survive to the husband on her death. But by the Statute of Henry 8th they were given to the husband; they now rest in him on the wife's death, & go to his Executors &c.

2 Ba. 47. Co. Litt. 351.

Co. Litt. 351. 1 Ba. 577.

Plow. 692. 1 Roll. 350. 2 Ba.

17. 4 Co. 57. Co. Litt. 162. ^c

Rent accruing out of wife's property during Coverture goes to the survivor.

1 Ba. Con. 103

The wife at common Law can have no separate property — But a gift to her sole &

Baron and Femme.

separate use is protected in Chancery - To what only this refers in law the Husband cannot have any right, either by Courtesy or otherwise - but on such she may exercise as absolute a power as she could were she a feme sole, except that she cannot devise it, if it be used by Statute Henry 8th

The husband cannot by his descent defeat any gift to the sole separate use of his wife, tho he may be common law heir

When the wife has been allowed to hold separate property, trustees have been thought necessary to stand in her use - But this is not now the case - For any property real or personal may now be given directly to her separate use, either before or after marriage & that too either by her husband or any other person.

As it has been held that if a feme sole purchases a trust term to her separate use, manes, her interest vests in her husband - pro maritagio.

Of the wife's right to her Husband's estate

In England under the Statute of Distributions 20th Geo 2^d in connection by Statute - If the husband dies intestate leaving issue, the wife is entitled to one third of his personal property absolutely, & if no issue to one half the assets of the husband being first paid.

1st Geo 4th 444. 1st Fonth.

8th 90. 91. 98. 102. 3.

1st Ath. 2nd 3rd 293. 695.

30th 337. 1st Geo. 303. 2nd 191.

663. 2nd Geo. 748. 6th Geo. 156.

1st Geo. 3rd 116. 1st Geo. 303.

1st Geo. 566.

1st Fonth. 98.

1st Geo. 126. 2nd 79. 316.

1st Ath. 2nd 3rd 2nd 618. 5 do.

137. 2nd Geo. 665. 1st Geo. 444.

1st Geo. 94. 8.

1st Fonth. 98. 1st Geo. 718.

2nd 3rd 270. 2nd 421. 2nd 618.

345 - 1st Geo. 665. 3rd 116.

1st Geo. 465. 2nd 79.

2nd Geo 375.

2nd Geo 427. 8.

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Dower

2d 32

2d 127, 128, 129, 36

7th 127, 2d 347
2d 146, 126, 129, 128, 35

2d 127, 128, 33

2d 120, 126, 127, 50, 98
1st 681

6d 122, 33, 2d 120, 127, 109
6d 120, 126, 127, 128, 129, 127

3d 128, 6d 120, 127, 109

2d 121, 122, 36, 6d 120, 33

3d 128

6d 120, 127, 109

6d 120, 127, 109

3d 127

At Common Law the wife is entitled during her life to one third of all the husband's real estate of which he was at any time seized during coverture & which any issue which she might have had could have inherited. And the husband cannot, by alienation bar her of this right. She must join in a judicial conveyance in England. In New York in a Deed

any issue which she might have had is - Dower, if any issue which she might have had could not inherit - e.g. Dower in special tail

She must have been the actual wife at the time of his death - At Common Law a divorce a vinculo re takes away the right of Dower -

So also a Divorce a mensa et thoro did not

If the husband dies before the age of consent yet the wife is entitled to be Dower. But she must be above the age of 14 at his death. Wife has Dower the above a woman has none -

It was formerly held that the wife of an idiot might be endowed tho the husband of an idiot could not be tenant by the Curtesy - It is now determined that she cannot be endowed

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10 Co. 49

2 Mo. 144. 66. 64. 66

11 Mo. 127. 102

2 Mo. 144. 32. 66. 31. 35

10 Co. 21.

2 Mo. 31. 36. 128.

10 Co. 40

10 Co. 481

10 Co. 321. 2 Mo. 526

10 Co. 319. 10 Co. 466

10 Co. 470

2 Mo. 135. 66. 32. 10. 132

2 Mo. 140. 10 Co. 682

10 Co. 149

2 Mo. 144. 66. 32. 10. 132

3 Mo. 190. 66. 32. 33. 2. 12. 170

The wife's right of dower is paramount to all
Devises, creditors, & mortgagees, to whom conveyance
is made after coverture. The right to personal property
is made after coverture. The wife's title has relation to the marriage &
not to the husband's death. Dower in Law is sufficient
to entitle the wife to her dower. But it is not sufficient
to entitle the husband to the dower. In Connecticut
the wife is entitled to a life estate in one third of the
inheritable property of which her husband is seized.

The wife is entitled to a third of what the
husband owned at his death. A life estate in the
husband may defeat her right here by alienation not
by alienation in contemplation of death & a provision
for his family. Since this is testamentary
disposition. She is endowed in this case even
tho her husband was deceased. In England the
wife is not endowed in an Equity of Redemption
on mortgage in fee. Secus in case of mortgage
in fee. In Connecticut tho the mortgage in fee, the
wife is entitled. & justly so. The right of the wife is
here as a English paramount to all devises, mortgages
& creditors. But it is barred by an agreement with an
adversary by Statute. "William 3" as also by a statute
a, viz. 12 Co. 17. 10 Co. 470. 10 Co. 470. 10 Co. 470.
Treason of the husband bars it. 2 Bac. 443. 6 Co. 17. 15.
5 Co. 75. Retaining the title deed from the husband. 10 Co. 470.
as we have seen. In England also. 10 Co. 470.

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2 H. 1378. 2 Be 140
Dyer 358. 1 Bulst. 173

So wife is bound by accepting before in a rape, a
joinder

2 H. 137. 140. 10 Co. 4 C. 4.

So by levying a fine or suffering a recovery,
with the husband, of the land during coverture, in Eng-
land - In Connecticut a divorce a vinculo does not

bar the wife, unless she is the party in fault - Stat 147

How in case of fraudulent contract, proteus - Wife in
this case is entitled to other provisions than Dowry.

But of this proteus

The wife is also entitled to certain articles
of property called Paraphernalia - i.e. in
its etymology, something over & above dowry - accord-
ing to the English Law it means the apparel &
ornaments of the wife - Tho it is sometimes difficult
to distinguish between this & the property given to her
sole & separate use -

The husband is a stranger to the wife's prop-
erty which she holds to her sole & separate use for
she holds it to the utter exclusion of any right in him
that it is not so as to her paraphernalia, especially of
the second class - Property in order to vest exclusively
in a feme covert, must be given to her sole & separate use -
yet no particular form of words is necessary for this;
it is sufficient if the intention be manifest -
In some cases the intention is inferred, not proven

3 Atk. 393-

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16th. 98

any words evincive of it, but from the nature of the property & the circumstances under which it was given. Ex. gr. Diamonds, plate &c. given by husband's father on the day of marriage. &c. &c. similar present by a stranger. Trinkets given by the husband himself during his life are also in some cases exclusive property of the wife & not liable for the debts of the husband -

32d. 393-

Much however depends on the intent of the donor, *ut supra* - Aliter if devised to the wife by her husband then she takes as devisee, which presupposes that the property was the husband's - Property given the wife during the life time of the husband, for the express purpose of being worn as ornaments, is not her separate property as against Creditors in the above sense, but liable under certain qualifications for his Debts. There are two

32d. 394.

Paraphernalia;

16th. 911

1 Com. 353. Moore 213. 16

2d. 44. 495-6-

of which, there are two kinds. 1st. Necessary apparel & bedding. 2^d. Ornaments, or jewels & trinkets in general. During his life time the paraphernalia of the second kind are at his disposal; but according to modern authorities, he cannot devise them.

1 Com. 353. 6th. 243.

11. 30. Note 911

2d. 44. 495-6. 578.

3d. 358. 395. 2d. 44. 536.

1d. 44. 495-6. 578.

5th. 448. 5th. 501. 2d. 44.

436-

- This however has been overruled -

The first kind cannot be taken by Creditors, nor can the husband sell them - He may perhaps sell somewhat certainly not all of them. If he does it will be a misdeemeanor -

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1 Com 350. 2 Atk.

104. 3 do. 369. 10th 730.

3 Atk 395. 10th 730

The paraphernalia of the second class are assets in the hands of the husband, & extend to discharge his debts, after the other personal property is exhausted & not before - for the wife as to these is not only proposed to the representatives but over to the legatees.

10th 730. 2 Atk 104

3 do. 369. 2 do. 77-

Land in England being liable in the hands of the heir for specially debts, & specially creditors take the paraphernalia of the second class, the wife is as a creditor in Chancery against the heir for so much, as these creditors have taken of her paraphernalia.

Paraphernalia of second kind

2 Atk 104. 5-

2 Atk 77. Com 552

1st Not liable for debts. If there be no trust in the real estate for the payment of debts, & Paraphernalia are taken by creditors, widow cannot at all times come upon the real assets. i.e. probably she cannot in all cases, as if the creditors who took the paraphernalia were simple contract creditors - Jewels which the husband kept in his own possession but permitted the wife to wear are paraphernalia.

2 Vern 49. 83. -

1 Com 559. 2 Atk. 642.

A settlement or jointure on the wife before marriage in bar of all demands on her estate, or in pursuance of articles made before marriage, stipulating that the settlement should be in bar, takes away her right to paraphernalia.

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If the husband creates a trust in lands for payment of "debts", they are liable for debts by simple contract. Personal property however is first liable. If then paraphernalia of the second class are taken even for simple contract debts, the wife will be considered as a creditor in Equity.

3 Atk 438. aff. 105. 1 Com 538.

She has also the same right against the devisee of lands as against the heir; for her dower is preferable to that of Legatees or Devisees -

3 Atk 395. 1 W. 730

If the husband pledges the paraphernalia, the wife, not the executor has the right of redemption: and if there be a surplus of personal property after the payment of the debts, the wife is entitled to it, to redeem even in exclusion of Legatees.

1 Com 59. 3 Atk 395.

If in the case supposed the personal fund has been exhausted by specialty creditors, she has the same right, I suppose, against the heir. So I suppose, if the husband's lands were charged with the debts, & the personal fund has been exhausted even by simple contract creditors. For in both cases, she ought, after payment of debts, to stand in the place of the respective creditors.

The wife's right to claim property as paraphernalia is not transmissible: ex. gr. the husband devises paraphernalia of the second kind to wife for life, remains an

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1 Com. 359-
2 Ven. 246-7.

to another; The wife will hold them during life, as under the will, not claiming them as paraphernalia - On her death they will go to the remainder-man & not to her Executors or administrators. For as she makes no claim to them as paraphernalia, administrator cannot - This however is the substance that she has done nothing that amounts to a waiver -

In Connecticut real as well as personal property is liable for debts, and as the executor, if he should take this property for the payment of Debts, would himself be immediately liable, reimburse the widow, if there were other assets sufficient; Quare, can he take them at all in such cases unless both funds are exhausted? If he can, the widow will be a creditor against him to the amount of them against all the estate of the deceased real & personal In Connecticut, necessary household goods are allotted the wife, by Statute when the estate is insolvent -

Lecture 30th

Husband is liable for any action
contract of the wife which he authorizes
or permits - 1 Esp. R. 142.

Of the Husband's liability on the wife's account.

Husband & wife are jointly liable: 1st for the
wife's debts & 2^d for wife's torts. 3^d in some cases
for her crimes. of these in this order - 1

1st He is liable for her debt to contracted while sole.

But this liability ceases on her death, unless sure, &
it seems unless judgement be recovered.

Suppose husband dies first, she & not his executor, is liable.

If however judgement be first had against them, it will
alter the case of the debt, for then there is no liability unless
judgement be recovered - If then she dies first, no

judgement having been recovered, ut supra, the creditor
loses his debt, unless she leaves assets i.e. choses in action.

If he dies first debt survives against her, ut supra. The
principle of the husband's liability is this; that as the wife
by marriage loses the command of her property & is thus
deprived of the means of securing herself from assets in
comment, she ought not to be thus personally liable without
the husband. Besides he has the avails of her labour.

She cannot therefore in any civil case be taken &
sold for a debt or tort: she must be discharged in the
case on bail - Except when the action is brought against her
while sole, pending which she marries; her execution goes against her alone.

1 Ld. 337. 3 mod. 186.

1 Woll. 351. bar. 366.

376. Equity cases ut supra.

1 Bar. 307. 293. 702. 348.

1 Bl. 443. Esp. 122. Ent. 30.

Exp. 122. 3 R. W. 409.

Co. Litt. 351.

1 Bar. 272. 1502. 486

1 R. 168. Moore 468

3 mod. 156. Woll. 352

1 Bar. 307. 1 Woll. 149. 3 mod. 124.

1502. 486. bar. 445 -

2 Bar. 702. 8. 115.

Co. R. 70. 6 mod. 17 -

1 Woll. 149. 3 mod. 124.

bar. 323. Esp. 328. 486. 60

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5 Com 196. 2 Bl R.
1272.

1 Vent. 49. 1 Hen. 5. 2 Bl

2 Bl R. 203. 720

3 124. 149—
Hia 1237. 1167—
2 Bl R. 720. Exp 327.

1 Roll 348. — 431.
Co. Ca. 355. 184. 254.
Co. Ca. 301. 182. 387.
3 Bl. 414. H. 1237.
1 Hia. 149. 182. 295—

Pala 313 Calam. 366
519—

Co. Ca. 374. —

1 Hia. 3. 4. 4 Bl 28.
to crimes

1 Hale Bl. 65—
1 Hia. 44—

If both are taken on mesne process, she is discharged
& he remains in custody, till he puts in bail for both.

This is however denied to be Law. For no one it is sup-
posed will become bail for one having no property &
Command —

The wife is to be discharged in summing up
as a feme sole, tho arrested as such, unless the coverture is
notorious. Still less if she has imposed on the Plaintiff
pretending to be feme sole — Defendants in such case
is to prove Coverture.

If taken alone on final process
against both she is not discharged; unless there be collusion
between Plaintiff & husband to keep her in prison —

2^d — The husband is liable jointly with his wife during coverture
for her torts committed while sole. The Law is here the same
as if she alone & without the direction, approbation or consent
of the husband committed a tort during Coverture.

Where the husband & wife are jointly liable for his torts,
she continues so after his death —

But the husband is answerable for wife's torts only during coverture.
So if she commits it in his absence, but by his direction, he alone is liable.
Then there is coercion & the wife is bound to obey.

3^d — The husband alone in some cases is liable for the
wife criminally. Ex. gr. In cases of Larceny or house theft
committed by her, thro his coercion, or in his presence, he is
liable alone. The act is then considered as his.

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1 Haskels Rep 31.
4 Bl. 28 crimes.

Same exceptions extend to Burglary & Larceny Robbery
But this is questionable.

1 Bank. 4. Kel 331
4 Bl. 29.

The wife is liable as if sole if she commit thefts
voluntarily, or in the husband's absence at his command.

For such command it seems, falls short of coercion —

Hask. 26. 65. Bank 4
Stee 1120. 4 Bl. 29.

But for higher crimes, as treason &c committed by both,
both are liable, tho the husband used coercion: & if by
her alone, she alone is liable.

1 Bank 5. 26. 294

If the wife incurs the penalty of a penal statute
husband is bound to pay it, tho she commits the act alone
& without his privity: He is liable with her & may
be made party to an action or information.

1 Bank 3. 65. 50. 50
Hask. 26.

If in his company & with his approbation he is liable
alone, I apprehend —

3 Inst. 106. 1 Hask. 44
4 Bl. 38. 9. 2 Bank 481.

We cannot make wife accessory in a felony for receiving
& assisting him tho a felon.

1 Hask. 4. 9. 6. 72. Hask.
43. 3 Hask. 34. 34. 482.

In all cases, in order to which the above ex-
ceptions do not extend, the wife is liable, for crimes as if
sole.

Of the wife's power to bind the husband.

1 Br. 247. 1 Hask. 104. 430
6 Mod. 239. 1 Hask. 351. 1000
567. 4 Leon. 420.

Her power to bind the husband during coverture by her contract
is said to be joined on his assent, express or implied.

1 Hask. 348.

This principle however is too narrow in many cases.
For the husband is often bound when he expressly

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refuses to be bound. E.g. He must provide her with necessaries; & if he refuses she can bind him: & as for any thing besides necessaries she cannot as wife bind him by her own contracts.

118. 442. 152. 120.

1000. 367. Corp. 122.

Palk 118. 118. 357. 7.

The true principle then on which the husband is bound for her necessaries by her contracts seems to be his obligation as husband to provide her with necessaries, i.e. food, apparel & medicine - such goods as are suitable to her rank

Sta. 1214.

467. 480. 42. 1 do. 441. 3 do. 257.

Corp. 122. 4. 2 Leon. 4

18 W. 782.

Tho it may be said that from his duty, the Law implies his assent & that the implication is not rebuttable.

Palk 118. 6 moe 239.

Sta. 163. 1 Parle. 67.

The husband tho an infant is bound for wife's necessaries.

At any rate when the husband is bound without actual assent it is on the ground of an implied assent, or duty as a husband.

If having the power to discharge himself by dissent, where he would be otherwise bound, he does not, he may be considered as bound by his implied assent - So if not having power to discharge himself, he does not attempt it he is bound by an implied assent - But if not having this power, he attempts to discharge himself i.e. prohibits, the husband seems to be bound on the score of marital duty.

LaO 1006

Palk 118 -

That the husband cannot be bound except by his assent express or implied -

2 Ba. 297 -

Cases in which she can bind him for necessaries -

Cases in which she can bind the husband clearly on the ground of consent - 1st When there is an express consent of the husband before the contract - 2^d Consent of the husband is freely given

118. 429. 2. 1. 109

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1 Com. 567. 1 Roll. 330. 122. 120.

afterwards:

1 Com. 566. 1 Sid. 128. 129. 430.

§ 3rd Where a wife usually provides necessaries for the family, & the husband pays for them for her there is an implied assent.

1 Com. 567. 1 Sid. 120. 322. 333.

§ 4th Where necessaries provided by the wife come to his use, or that of the family, here the implied assent is subsequent. See also 2d R. 1006.

1 Roll. 430.

In these cases the wife acts as servant.

1 Sid. 109. 120. 126. 1 Roll. 357.

1 Sid. 113. 2 Vent. 155. 124. 44.

The contracts are those of the husband. So perhaps in some other cases which might be mentioned, he is clearly bound on the principle of assent.

1 Roll. 430. 124. 95.

2 Vern. 643.

A general credit given to the wife, at super, cannot be determined by any private prohibition, so as to defeat the claims of those who afterwards trust her on the husband's account - as in the case of servants.

1 Sid. 118. 2 Sid. R. 1006.

Exp. 123. 130. 300.

If the wife without having a general credit purchases cloathing & pawns them without having worn them, the husband is not liable; because they never came to his use. Aliter, if she has worn & then pawns them, unless expressly prohibited.

2 Sid. 283. Exp. 123.

10th Nov. 183. 1 Roll. 350.

If she pawns her cloaths before or after wearing them, & borrows money to redeem them the husband is not liable for the money - This is a transaction distinct from that of procuring necessaries.

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3 H.L. 600. 4 Bm. 2078. If the husband turns away his wife, he is
 Salk. 119. 1 Bm. 118. 568. liable at all events for her necessities, unless
 1 Y.B. 348. 12 Mod. 244 the commits adultery. No prohibition general
 1214. 1 Esp. N. 6. 687 or special will avail him. "Agent" to be
 3 do. 287. La. R. 444. understood according to Salk. 118. Str. 1214. i.e. he
 gives a general credit to Esp. 124.

1 Lex. 41. 1 Salk. 13. 62. If a man cohabits with a woman & allows her
 387. Bull. N. R. 136- to assume his name as his wife, he is liable for her
 Rowood vs. Here man necessities, tho' not ^{to be known} married. Therefore "never married"
 124. Salk. 437 is a bad plea in an action for the debts of the wife.
 2 Esp. N. 6. 637. Such a plea however is good in an action for
 Dower & on an appeal.

1 Salk. 444. 1006 - If the husband & wife part by agreement, & the
 Salk. 116. 12 Mod. 244 husband allows her a separate maintenance, he is
 1 do. 147. not bound for her necessities at once, after the separation
 is generally known in the place where she ^{lives} lives -
 whether known or not to the person trusting, or in the
 place where the trust is given - rather an material.
 3 Esp. N. 6. 250 - But before it is thus generally known he is liable
 1 Br. 300. Salk. 116. Presumption sometimes that wife was trusted on her own
 credit.

Exp. 126. 7. 4 Bm. If the wife living separate has no separate
 2078. 6 L.R. 604 - maintenance, the husband is not discharged -
 1 Br. 307. 127. and on he gives express notice not to trust her is when the joint resolution is made that she has no part
 1 Br. 306. Salk. 110. 600. If the wife clothes & lives with an adulterer
 171. 2 Esp. 125. 171. 4423. or otherwise, the husband is clearly not liable, after & the

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1 Rev. 8. - elopement is notorious -

1 Bos. & Pul. 338. 1 Str. 647.
706. 12 mod 244. 6 Str
603. 2d R 444. 1 W. Bl. 348
Exp. 145 -

(And according to the current
of authorities he is not liable at all, but forever
discharged. ^{up to the attorney} <sup>occasions her loss liability for indemnity con-
tract comes. 4 exp. N. R. C. 42. 1 exp. 1000. 1000. 1000. 1000.</sup>

that it makes no difference whether
the elopement be adulterous or not, vice.
2 Str. 875. 1 Ark 118. Exp 125. 1 Bos. Com. 96. 1 Rev. 5.

Lecture 31^A

1 Bos. & Pul. 338

The wife living in adultery is bound by her own
contracts.

1 Bos. & Pul. 226. 1 Str. 647.
706. 6 Str. 603 -

But if the husband suffers her to remain in his
house, with his children, having made no provision for them
& she living in a state of adultery, he is liable for her
necessaries, if the Plaintiff did not ^{know} of the adultery.

2 Bl. R. 1079. 1 W. Bl. 96

8 Str. 547. Exp. 125.

1 Bos. 297. 1 Str. 875. note

But the husband is not liable for her
necessaries during her elopement, neither is the wife
liable, for she is still a wife to all intents & purposes
she has no property separate & sole. & the marital rights are
entire.

1 Str. 127.

Where the husband & wife live separately & the
husband is liable for necessaries furnished her, the articles
should not be charged generally as furnished to him, but the
special matter should be shown. ^{so as to be a lien} the cause of the action should not be identified

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If the husband provides necessaries at home, he has a right to prohibit the public as well as any individual from trusting him, & may thus discharge himself.

1 Lev. 5. 15d. 109. a

He may thus terminate any credit which he has given her either with the public or individuals.

Ex. 122. 1d. 118. 114. 442. 1d. }
vide Ed. 5. 150. b

But he cannot thus deprive her of necessaries it seems.

Exp. 125. 16m 568.
Herm. Ba. 294 300. 11. 875
1st year de Salk 119 -

If a wife elopes not with an adulterer, and afterwards offers to return, & the husband refuses to admit her, he must support her & is bound for her necessaries afterwards.

1 Lev. 4. 11. 109. k. 4. 11m
2177. 11. 296 a 11m 124.

In this case a general prohibition by the husband against trusting her is not good. But a special one is good.

6d. 603. 11. 845 -

Suppose the elopement is adulterous: is the husband then bound after refusal? Clearly not. Here the wife is guilty of the first wrong. But if the husband turns the wife away, & probably if she leaves his house on account of very ill treatment, the husband is bound for her necessaries against a general, or even a special prohibition. Here the husband is guilty of the first wrong.

2 H. 1214. 12m. d.
244. Salk 118. 119 -

For money lent to the wife, the husband is not liable, unless actually expended in purchasing necessaries & then only in Ordinary - because as there is danger of misapplication the Law will not

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Salk 279. 387 -
Pre Chan. 502 -
18 W^m 483 -

favor him: For the contract is good as long as the time of lending, & is not affected by, matte^r ex post facto.
In Chancery the lender stands in the place of the vendor & recovers to the amount of the necessities -

How would it be, ^{the} lender himself lay out the money for necessities?

1 Tonbl. 259. 2 Ben. 7. 18. of property by a woman before marriage to her separate use, was fraudulent as against the husband. what
20 W^m 335 -

1 Tonbl. 98. 1 Ben. 7. 18. So that if a woman possessed of a trust term marries, the interest will vest in the husband jure maritagii.
2 do 270. 2 Atk. 421 -
Law. 2^d Chan. 345 contin.

A contract by which one is bound to the husband, to pay money to the wife, is not subject to her contract - she may receive the money as it becomes due - but cannot discharge it -
3 East 331 -

of the wife's power to bind herself by her own contracts.

It is a general rule of the Common Law that a wife cannot make herself liable by her own contracts - 10 Co. 42 -
Roll. 347. 1 Bl. 442 she she may, in many cases, bind her husband -
The reason generally assigned is, that her existence is merged &c. - but one will see. Regularly her contracts are void at Common Law. 1 Str. 94.

2 Atk. 293. 1 Bos. & P. 90. 97 -
20 W^m 144 Salk. 7 - Hence a promise (even in consideration of forbearance) made after her husband's death, does not bind.

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3 Ba 304. Lou. 11.
 Comp. 203. Doug. 53-
 2 St. 776. 2 W. 172.
 7 St. 478. 1 Donl. 131.

The uses of the wife are only voidable for the advancement of agriculture.

1 Bos. & Pul. 359. 14 Bl.
 336. Cook. Bank. L. 25.
 14 Bl. arguendo 345-6
 1 Bow. Con. 101.

The true principles of this rule are, 1st The Law has either deprived her of her property or disabled her to dispose of it; 2nd if she should dispose of it, the husband's right would be violated - 3rd it might be said that she was coerced - 3rd The husband has a right to her person, & if she could bind herself, this right would be violated.

1 Donl. 90. 91. 102.
 6 Brown's Paul. Cas. 156.

But as Chancery has allowed her to hold separate property, she may now bind the property even while living with the husband, to the extent of the property, but no farther.

For the husband has no right to that. -
 2 Ves. 190. 2 Ack. 379. 2 W. 174.
 334. 1 Brown Chan. 16. 2 W. 744.
 8 J. R. 545 -

If she was bound at Law to any extent, her person might be taken - So the governing principle is preserved. If there are trustees of such property for the wife, she may dispose of it without their intervention, unless their joining is made necessary by the instrument under which she holds.

1 Donl. 103. 1 Ves. 577.
 vide 14 Bl. 534 -

1 Bow. Con. 75-6. Moore 85 to 88.
 8 Op. 127. Jenk. 4. 11 Will. R.
 409. 1 Ba. 308. Cook. Bank. L.
 1 Bank. 100. 34p. 188.
 25 J. R. 1. 1 Vern. 104. Collett.
 132. 133. 1 Bos. & Pul. 357-
 1 W. 174. 346. 2 Vern. 104. Salk. 116
 640. Combs. 402.

If the husband is banished or has acquired the realm, or is transported, or is an alien enemy, he is civilititer mortuus, & the wife is considered as a feme sole, she may contract at Common Law, is liable to be sued, arrested &c. - & to sue alone -

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1 Bou Co. 76 Moore 666

1 Bou Co. 354

1874. 545

1875. 546. 5 J.R.

658. 640. 665. 4da 766. Brown

Cham 737. 444. 633 & arguendo

634. 647. 2. 244 R. 1079. 175. 175. 175.

So in case of a divorce, a mensa & thoro.

rules if the husband lives abroad (it seems) & the wife trades as a feme sole. If the husband & wife are separated under articles of agreement & the wife has a right to a separate maintenance, she is liable even at common law to the extent of her contracts.

The principles of the decision in *Cockle v. Belmire* are
 1st The wife having separate property, her liability to the extent of it, does notoust her privilege, nor violate his right of property. 2^d There is no coercion (sed ad hoc quare) 3^d The marital rights of the husband to her person are not affected. Objection, wife's existence merges; why not in Chancery then also? — The notion of her merger seems, 1st To privilege her while she & her property are under the control of the husband — 2^d To preserve his rights. This however does not apply to such a case as that of *Cockle* or — vide Ashurst's principle refuted by Powell, page 92. — 1 Pow. 101 admits that she may be considered in law as bound to the extent of the separate maintenance. How so, if her existence is merged? She has no will of her own & if the husband assents, he ~~cannot~~ ^{also} assents in binding her person, as he gives up his right to her —

1 Pow. 101

1 Pow. 103

Equity is the proper forum. Chancery can act upon the subject matter.

1 Pow. 92

But I conceive she wife has property, & the means of acquiring property by her labour;

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for he has relinquished his right to her as servant
 But if he in the realm, she cannot be sued alone, the living as a separate maintenance - 8 T.R. 545
 eye neither the privilege nor his is it is violat.

2 Burns Chan. 385.

387.

1 Nov. Com. 79, 80, 100, 600
 Bank L. 24, 28, East 124.

In *Barnett vs Brooks*, action at Law, the
 wife alone was held liable, tho the husband was
 within the realm, he was not held liable, there being a
 separation. This was for necessities - But this is now
 overruled after solemn arguments - See 8 T.R. 545

4 T.R. 66, bdo 604

5 do 682

A feme covert living separate without sep-
 arate maintenance, is not liable to be sued

1 Nov. & Bull 338.

But a feme covert living separate in a state of
 adultery is liable for her contracts, as before observed -

1 Com. 560

2 Nov. Chan. 386, 1 Nov. 384

1 Nov. Com. 22, 1 W. Bl. 341

1 Roll 346, 150, 106, 43.

Roll 225, 7 Co. 8, Co. L. 40

If a feme covert living with her husband,
 her's alone a fine, or suffers a recovery, he may
 defect it during her life (or after if tenant by courtesy)
 by entry, tho she cannot.

(And as in England a freehold cannot be created as
 as to Commerce, in futuro, so as to her personal property,
 which is, then generally, i.e. subject to his controul; she can
 in no instance dispose of her property by act executed, except
 such as is to her sole & separate use; tho she may devise
 her choses in action - provided as to her power of devising.)

If the wife having separate estate, permits
 her husband to receive & use the ~~the~~ rents & profits,
 if it be real, or the interest if it be personal, it is
 considered in Equity as having abandoned the rent &c
 to him. This presumption however may be rebutted
 by proof - It was observed, unless that the husband

1 Nov. Com. 422, 3

2 Nov. Com. 82, 1 W. Bl. 269.

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cannot defeat gifts to wife's sole & separate use, nor can he defeat a descent of real property - this however has been questioned whether he can defeat devises to his sole & separate use. But if he neither agrees or disagrees, the purchase is good during coverture.

Co. Litt. 3. 356^b
2 Bl. 292. 3. 16 Com. 566.

1 Roll. 349. Co. Litt. 3^a
356^b Doug. 435. Exp. 291.

Co. Litt. 3^a

1 Roll. 349. 3646.

Wife after Coverture may dissent from her purchases or ratify them. It is without the husband's representatives have the same right, if after Coverture she did not make her election.

If the husband & wife are made Tenants in common, she may disagree to the purchase, after Coverture.

A leasehold freehold may be granted to commence in futuro; provided the first limitation be to a person in esse, or the immediate issue of that person. This by Statute 24. May not the wife here grant by deed her own freehold to commence in futuro? The fee is absolutely hers, & there are no marital rights to be affected - 1st She incurs no liability - 2^d The husband's right to her property is not violated - 3^d For his right to her person. It is decided that she may devise & the object of Coverture is no stronger in our case than in the other.

Baron & Feme

Of Agreements, between the husband & wife

It is a general rule of the Common Law, that
 Co. Litt. 264. 112. all contracts between husband & wife, are void;
 Cro. Car. 551 & that those made between them, before coverture
 1 Bl. 442 are dissolved by intermarriage

If the wife of a Defendant becomes Executrix
 8. T. R. 487 - or administratrix to the Plaintiff the action is
 destroyed - So if the Defendant has been taken
 in an Execution by the original Plaintiff, he must
 1 Bl. 442 - be discharged. The reason assigned is that the
 legal existence of the wife is merged - The
 true reason generally is, that the right & obligation
 sal. 326. would meet in the same person; (as pr. Case
 before & after marriage) & the recovery if obtained
 would in many instances be nugatory, the
 reason of the husband is 1 to wife's property -

To the rule itself there are many exceptions
 (these exceptions not consistent with the reason assigned
 generally, tho they are within the other) in many cases
 however the rule holds good.

Baron & Feme -

of Contracts between Husband & wife during Coverture.

1509. 10 Plow. 84
Book i Barlie 25.
17. 31. 336. 345. 6.

At Common Law, no contract between husband & wife
respecting personal property is valid. *cause que supra.*

And the Common Law does not recognise a right
in the wife to hold personal property.

Co. Litt 3rd note 1st 112 -

1 Pow. Com. 84. 46. 89

A Deed of Land directly from the wife to
the husband would be void at common Law,
as before observed for the same cause, i.e. the
husband's right to his property - for the controul
& usufructuary enjoyment would still be in him

Lecture 32^d

2 Ves. 191 n. 102 163. 577.

6 Br. Pard. Cas. 156

1 Brown Chan. 16.

1 Atk. 270. 18 Wm 126

2 Ves. 64. 2 Ves. 669.

1 Fort. 90. 91. —

But it is now settled in Chancery, at least, that
the husband may settle property to the sole & separate
use of the wife, during Coverture, & that his agreements
respecting that property even with the husband himself
are binding

2 Atk 337. 342. 332 - 3

Co Litt 3rd note 112. 46. 29.

A Conveyance by the husband to a third person
for the use of his wife is good at Common Law. Since
the Statute of Uses, a conveyance may be virtually made
directly by the husband to the wife, without the aid of Chancery.
The Deed vesting the use, the Statute the possession -

Baron & Feme.

3 *Pere Williams* 307.

So if the husband in order to encourage the industry of his wife, engages to allow her a part of the avails of her labour, it is good in chancery.

Coke upon Littleton 3^a

note 1. 1 B. 4. 441.

Donatio mortis causa from the husband to the wife, it seems is testamentary.

1 H. Bl. 334. 341. 351.

If the husband covenants with his wife not to intermeddle with her estate, he is estopped from doing it, & she is not left to her covenant i.e. I suppose she may obtain an injunction against him, or disclose of it.

M. 478. 701. 356. 381.
2 Ven 297. 8 med 22.
2 Vern 386. 691. 3 TR 5.
3 Br. Chan 644. 2 Ves 283
1 Burr 562. 1 Fowl. 105. 514. 255.
2nd ed. copy

Observed antea, Article of agreement between husband & wife to live separately will be enforced in Equity or Law to the extent of agreement & no farther.

1 Nov. Con.

Therefore any property afterwards coming to the wife, will be just so far at his disposal as if there had been no separation, unless the contrary is expressly stipulated between

5 Com 567. Now Dec 150

A feme covert may execute a power or authority given by the husband or indeed any other person, or retained by herself, to convey or devise an estate, if the estate is settled by way of trust, or of power over an asc. as an estate to the use of a feme covert for life remainder to the use of such a person as she by any writing se

1 Roll 329. 2 Ven 75. 141. 610.
6 Br. Ch. Cas. 156. 1 K. 14. 340
Lalsh 39. 104. Co. Litt. 112.

2 Burr 210. 180. 110. 192.
2 TR 692. 695

So by way of trust she can dispose of the real property of the husband or any one else, as an estate conveyed to trustees in trust for her separate use for life, remainder to - It seems she cannot devise or execute a power in any other way.

Baron and Sme.

1201 And 172

But not if the power is over her own interest

In these cases the appointer is considered as taking by virtue of the devise &c - giving the power thus the person executing the power under power Devise -

Comper 278. 56. 60²

A voluntary settlement by the husband or the wife after coverture is void, as against the subsequent purchasers knowing the facts as being fraudulent by Statute 2^d Eliz.

Of Contracts between Husband & wife before

Coverture.

It is regularly true, that if the husband is indebted to the wife, or vice versa, before coverture the intermarriage extinguishes the obligation.

1746 442. Com. Com. 551.

Suppose the husband is indebted to the wife by bond before marriage & the husband dies, leaving the bond uncanceled, will it revive? This is the general opinion that it will not - a personal contract once extinguished, is forever extinguished.

24 Bl. 10. 1744 442.

Com. Com. 551. -

Com. Com. 551. Foulk. 93.

If obligee marries one of several co-obligors, the whole debt is discharged - as to the general rule, the distinction is, where the contract is such as creates a duty on the husband during coverture & where it is not - A covenant or promise to leave the intended wife a sum after husband's death was admitted to be good at Law as well as in Equity. - Because there was no debt during the coverture. as to bonds before coverture, conditions to leave &c - there has been much difference of opinion as to its force at Law, final part being a debt.

Fulk 325-6. 1744 93.

Baron and Feme

21. 11th 243. 1 Ba 292
21. 11th 290. 2nd 97. See Chanc.
237. 2. 1st 343

But there can be no doubt but that such a bond in Chancery is good as evidence of an agreement.

Such a promise to leave se before marriage, has been adjudged good as early as Croker & Hobart's time
See 5th 1st 216
Justice Hobart contra

So of such a bond vide Salt. 325. Carth 511. Holt's case contra
Houston 17. Con 67. 1 Role 343. 2 do 407. This point however has been considered very doubtful until quite recently -
In Chancery such a bond is considered as void - ut supra
So by late editions of Bacon. 1 Ba 291. 2. 20. 11th 243. 5th 1st 383.

5th 1st 381

But it is now settled to be good at Law - The wife may by accepting a jointure, i.e. a competent livelihood of freehold for the wife in lands & tenements se before marriage, have her right to Dower. Subsequent intermarriage never considered as extinguishing such agreements.

Co. Litt. 36. 4 Co. 1. 2.

2 Pl. 140

The English Law as to barring dower by jointure is regulated by Statute of Uses 27 Hen 8th -

Of the Requisites of a Jointure.

- 1st It must take effect immediately on the husband's death.
- 2nd It must be for the life of the wife at least, not *per annu. vic.*
- 3rd It must be made to herself & not in trust for her.
- 4th Expressed to be in satisfaction of her whole dower.

Co. Litt. 36. 4 Co. 3

Judge Reeve thinks it probable that in Connecticut a jointure might consist of Personal property, but this Mr Gould doubts, since "some other estate" evidently means a larger estate than for life.

Statutes Con. 147

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Baron & Feme.

If the jointure be settled after marriage, the wife
2 Hb. 138. 2 Ba. 140. may on the death of the husband, accept or refuse it,
1 Balst. 137. Dyer 158. & take her dower, but not both.

If the wife agree to accept a gift by devise
4 Co. 4-5. bro. P. 128. instead of Dower, she may after coverture determine,
Pow. Dev. 480. La R 483. accept or refuse so to do: & she may take both generally
Co. Litt. 36^t. unless the devise is expressed to be instead of her dower.

Parol evidence, that the jointure was in lieu of
Dower, is not admissible. Lord Lovelace however
La R 438. 1 Rymer's ab. 219. has decided that it is, but his decision has been reversed
Pow. Dev. 480. margin 1000. 366. by Wright, and Wright's decision has been affirmed
1 Br. Parl. Cas. 593 — in domo proceum.

There is however this exception; tho' the
Devise is not expressed to be in bar of Dower, yet
the wife cannot take both devise & dower, if the
husband has devised all his other property, for this
La R 438. bro. P. 128. is proof of his intending the devise as a substitute for
the Dower.

Now it is a general rule that the marriage
settlement agreements, either before or after marriage
480. 493. 1 Fort. 84. are binding in Chancery.
93. 94. 2. atk. 97. —

Baron & FemeLecture 33^d

Some Rules not falling directly under the foregoing divisions.

If a husband join in a lease or other conveyance of the wife's estate for more than 21 years (1 Roll 349. 1 Ba. 302. - by force of the wife's estate for more than 21 years. 1 Co. 125. 2 Inst. 673. I suppose) she may after she becomes disinclined satisfy or annul, as when she leases alone, not annul.

If an obligation be given to Baron & Feme she may refuse the benefits of it after husband's death. If after such waiver it enures to the representatives of the husband, as an obligation to him alone. - 1 Roll 349.

If the husband & wife at Common Law are made Tenants in Common, she may disagree to the purchase or gift after husband's death; But if it be a freehold, a disagreement by parol, is not sufficient. In England she may disagree in a Court of record, or I suppose by Deed. So Entering taking the profits is a good agreement. 1 Roll 349. 3 Co. 26.

If an Estate be to the husband & wife, & to a stranger - the husband & wife have but one moiety - 1 Co. 552. 2 Inst. 674. Co. Litt. 18th - 8. - 324th.

Baron & Feme

1 Com. 352.
2 Lev. 39. 2 Ven. 120.
Co. Litt. 187^a 9 Co. 140.

If real estate be conveyed to husband & wife they take by enticities, not by moieties: ergo, the husband cannot by his own act, alienate even a moiety - he cannot sever the joint interest.

Mole 346 350.
1 Bro. 302. 1 H. Bl. 341.
1 Ves. 229. Co. Litt. 43.

A fine or recovery by wife alone, is good against her & her heirs. ut ante. But the husband may rescind it during coverture or after -

1 Bro. 302. 1 Fent. 300.
2 Co. 74. 8. 10 Co. 113.

These are the only conveyances of femes covert to which at Common Law they cannot disagree after coverture. If the husband join, her conveyance is good to all intents. It is doubted by some whether the husband & wife can convey by recovery -

Co. Litt. 3^a

If the wife make any other conveyance than a judicial one, & does not expressly or implicitly confirm it after coverture, her heirs may defeat it after her death.

For the reason why judicial conveyance by husband & wife or by wife alone is good. vide Pow. Con. 22.

Bro. Par. 501. Bro. Bar. 89.
2 Holt 576. 1 Lev. 140 -
Holt. 206. 1 Com. 572 -

If the wife is injured in her person & the husband thereby sustains consequential damage he has a right of action against the wrong doer -
Ex. gr. (Battery, Plunder, False imprisonment &c.)
In these cases the declaration must be laid with a prayer

Baron v Feme

Co. p. 342
4 Burr 205; Bull 248.
Dow. 102.

So in adultery the husband has his action. But
proof of actual marriage is necessary

1 Burr 542, 543, 357.

Husband cannot maintain an action for
adultery committed with his wife after separation by agreement.

1 Bro. 285. 1 Sid 113, 116.

1 W. 130. 1 W. 471.

According to the old Common Law, husband might
give his wife moderate correction.

Moore 874. 1 Bro 285.

8 mod. 22.

But according to the old Law, if he beats her
violently, or even threatens to do it, she could bind
him to the peace, by writ of supplicavit in Chancery -
or might obtain a divorce in the spiritual court
proper severitatem

1 Sid 113. 3 Keb 433 -

2 Lev 128. 1 Burr 445 -

1 Bro. 285 note -

1 Bl. 445. 3 Keb 433.

1 Sid. 113 -

But no violence is now allowed; & if
the husband beats his wife at all, she may bind him
to the peace at Law - & vice versa -

At. 478 -

The husband's power over his wife in this respect
was first impaired in the reign of Charles 2^d -

Burr 634. 542. 2478.

But the husband may still restrain his wife
of her liberty in case of gross misbehaviour, as from
destroying his property, keeping bad company &c -

Bulst 18. Co. l. 314-18.

1 Bl. 672. 1 Burr 239.

But in case of unreasonable confinement, she
may be released by Habeas Corpus

2 W. 499. 2 W. 674.

4 Co. 60. 2 W. 695. -

Co. pl 692. Co. 343. 2 W. 692.
argu. 2 W. 689. 2 W. 689.

The husband may justify battery in defence
of his wife, & vice versa -

If a feme sole make a will or devise, & afterwards
marries & dies, it is revoked.

Lev. if she survives the husband, & then remarries, it seems.

Baron & Feme

Of the mutual incapacity of husband & wife to testify for or against each other.

It is a general rule that they cannot testify for or against each other. The reason assigned is that the husband & wife are one person; and one maxim of the law is *nemo in propria causa potest esse testis* - another is *nemo esse accusare*.

Co. Litt. 6. 2. 3. 31.
158. 443. 4. 2. 678.

Bul. A. 3. 285.

Co. Litt. 6. 2. 3. 31.

Bul. 286. 1. 458. 162

168-169

Precedes their union of Interest prevents - as well as the Policy of the Law - This is indeed admitted in some of the Books to be the reason - 1. 458. N. 253.

The husband cannot testify where his wife is concerned, even tho it be against his interest. E.g. p.

Property settled to the wife sole & separate use was taken for the Debt of the husband. In an action against the thief the husband offered by the wife's trustee as an evidence was excluded -

4 L.R. 678 -

In no case, even between other parties is one allowed to give evidence tending to criminate the other e.g. p. When in settlement or other cases the marriage is dissolved on the ground of a former subsisting marriage the lawful wife is not admissible to testify to the former marriage - for this would charge the husband with bigamy tho' that his legal identity is not the governing principle -

1. 458. 161-2. 3. 285

752. 2. 286. 3. 31.

1. 458. 161-2. 3. 285

This exception is questioned
if it be Law —

1 Pl. 527. Exp 721.
Bulker 28% is that Law?

4th Declarations of the wife as to transactions immediately within her province have been admitted to be proved, to charge the husband. ex. gr. Declarations that she had agreed to pay a certain sum for nursing & child

In what cases the husband shall join
the wife in bringing actions

In some cases the husband must join the wife. In others he may or, may not, at his election: & in some he cannot join her - It is difficult to reconcile all these cases -

1786. 224. 1786. 347. 352
631. 1600. 575. 574. 1786. 304

1st General rule: The wife must join, where the right of action would survive to her after his death. Because if the husband might sue alone, he

1 Fount. 309. 1 Com 57. 1 Bu.
304. 1 Bal. 21. 1 Roll. 347.

would by commencing the action, assert a sole right in himself & money, & thus put the wife & her legal rights

Ex. 404 Bulat. 21.

In actions real, for wife's land they must join. So
it seems is ejectment to recover wife's land

1. Com 571. 1 Roll 347-53. Geo. E. W.

To in suits for wife's Charis which she has before
Marriage.

133 contra & Cap. 217. 3 Lev. 403

2 ark. 208. 3 do 21. 7 Tr 349. }

2 Lev. 107. 2 Wils. 423. Moore 422)

Roll 344-18-48. 1 Con 5 1/2. Geo E

400 Co. Lite 55 $\frac{1}{2}$

1 Com 551. 1 Sid 25

So to recover rent due to the wife when sole -
 & upon promises made to the wife while sole -

B. p. p.

Note V 360. Box 3/6. 2 LaVl

1208.16m 572 132 306.16m 32

§ For injury to the person of the wife during coverture as
Rape, assault & battery &c

160m 572

To for waste or wipes Lamer

Bunbury 277. 10 am 572.

Note 347.8. Moore 432

2. For trespass for cutting wife's trees during coverture.
2 Wig. 424 Bro D 96. Ver 145 contradicted by P. L. - can may have been for & allments

Baron and Seme

Co. Eliz. 133. 2 bent
145. 160m 575.

Action for destroying emblements on wife's land
or common garden vegetables &c does not survive; husband
must sue alone.

Prob. 127^m 160m 572

In Trespass for destroying or injuring the grass
on the wife's inheritance during coverture, husband must sue alone.

2 M. 426 Co. Eliz. 160

By some it is said they may join - 1^m

3rd R. 631 -

In Seme for wife's property, if the conversion

1 Ld. 387. La. 1208. —
with p. 117. or 146.

is before coverture she must be joined -

Wife must always be joined in Seme for ass. & battery & if her conversion resulted to the damage

3rd R. 627. 1 Ba. 306.

1 Roll. 347. Moore 422.
+ 2 R. 360

So in general for injuries done to the person or property

of the wife while sole, as Battery, slander &c. But husband may sue
alone for assault & battery of wife per modum conversationis emittit. Co. La. 538. & in some
declarations may declare for battery to himself. Co. La. 531. This is in case on the case of assault & battery in a

1 Ba. 289. Salk 114. 160m D.

574. 160m 261. Ld. 107. 32 R. 631.

If the property be taken lawfully before coverture, &

1 Ld. 102. Court divided.

Converted afterwards, the husband & wife may join in trespass
or the husband may sue alone. Lord Kenyon seems to think
the wife ought to be joined. Lecan de hoc.

1 Ld. 172 -

It seems he may bring an action of Detinue alone, in case
of bailment or finding -

Salk 114. 1 Ba. 307.

In trover by the husband & wife, the conversion
should be laid to the husband's damage only

The reason why the wife cannot sue alone, is,
that she cannot appoint an attorney, on account of the
coverture & marital rights.

Co. Eliz. 457. Moore 584

1 Com. 574. Moore 422. 1 Ba. 304

But if the husband distrains for rent ^{due to wife} while sole
& a rescue is made, he may sue alone for the rescue
or join the wife - he may consider the rescue as a tort to himself.

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Husband & Wife may join for a joint malicious prosecution of both; in which they have both received injury; or husband may sue alone *Pro. Sec. 553.*
Con. Dig. Dec. & Fam. X.

34. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

* In an act on the case for words not in themselves actionable, spoken of the wife,
244. chiefly husband sustains special damage, the husband must sue alone. So for
193. injuries committed during cohabitation to personal chattels, vested by law in him
244. both may join.
244. both may join.

Ch. Just. North, says that he "always took it for an unquestionable rule that whenever
in case the husband should die, the act would survive to the wife, there they might join;
but the husband may join the wife in many cases where he is not bound to join her
but may have the act alone." 1 Green. 236. 1 Selw. N.D. 245. note

Doddridge J. says "what the husband alone may discharge, & dispose to his
own use, he may sue for alone," asserted by Ch. Just. Coke. 3 Bulst. 164.

Husb. & wife can't maintain Traffic & subpoena process in their both for the Law all traff
 the sole interest to the husband : but Traffic may be maintained off husb. & wife, for the
 ych. 185. gift of the act is the conversion, which is a test, with which a form could may be changed as
 well as with Thespus. 1 Eller. N. O. 252.

+ In 1 Roll 26. 347 R. pl. 3. it is said they ought to join. In 2 Ver. 97. 7. is a distinction
 taken between choses in act & vesting in wife before & after marriage & confines the
 power of husband to sue alone to those which vest in him during coverture
 In Chal. N. O. 1799 the said a debt due to a man in right of his wife could be set off
 in an act of him on his own bond. In 3 T. R. 691 Ld. King's opinion
 See also 10 Ver. 9. 578. Hence until this question is settled, both should join. 1 Eller. N. O. 252

Baron & Feme

1601. 573. Palm 207

So in rent or costs accruing out of wife's lands during coverture - But why is not the husband obliged to join the wife in this case? The rent would survive to her.

Com 55. Mon 89. Roll

350 4. 5. 7. 11. 14. 17. Am 492

2 mod 217. 46. 230. 452. 616.

136. 305. 84. 246. 266. 676. 1601

574. 1 Part 432-3

So if a bond is given to the husband & wife during coverture, he may sue alone, or join wife.

And yet the bond would survive to the wife if the husband should die without disagreeing to her interest, as in this case he may disagree. Qu. It vests in him.

Part. or dep. 432 -

It does not survive to the wife in this case, in this case he disagrees to her interest.

Allen 36. 2 Ver 676-7.

452. 616 -

So if bond be given to husband & wife & executrix he may sue alone or join, & yet the bond would survive to the wife - So on Covenant accruing to the wife as Reversioner in fee during coverture (wren)

Doug. 314. Talk 250. 2

2 Lutes 1421

But in this case he must declare on the seizure, in himself & wife, in right of his wife - I fear it is on special demurrer.

3 Len 403. Ven 396. 1 Ed. 299.

1 Comd. 573. 4. 136. 305. 2 Ver 676.

1 Roll 20. 32. 2 mod. 217. -

Ed. 1. Mon 422. more full 20. 266. 454.

18. 18. 108. 1 mod 179. 2 Part. 134

1601. 575 -

18. 18. 108. 109. 1 alk.

458-9.

So if bond be given to wife alone during coverture - the husband may sue alone or join -

Suppose a legacy given to wife during coverture may the husband sue alone for it? It seems he may - For it does not survive to the wife - Qu. Does it not? But he may also join the wife as in the last case.

Baron and Feme -

If the wife is the meritorious cause of the action
 & a promise made to her during coverture, she may
 join in the action in some cases, tho the cause of
 the action does not survive to her -

Not without an express promise, i.e. in assumpsit
 or contract during coverture.

It is said in Croke Jac. 77. that the action
 in this case survives to the wife - But this is a mistake

It is denied by Salkeld 114. 1 Com. 572. The true

Co D. 61.

reason is said is that the husband affirms the promise
 to the wife by joining her in the action, i.e. he
 agrees that the wife may take the benefit of it -

In 2 P. W. 1239 arguendo, 1 Com in Croke Car. 77 it is
 said to be shaken; but the Court recognises it as Law -

2 P. W. 1236 -

The husband & wife cannot join in assumpsit
 without stating the wife's interest -

If a man marries a woman having children by a former husband, he is not bound by the act
 of marriage to maintain such children. And depends on the property which he acquires by the marriage -

4 T. R. 118.
 3 D. 462. R. 76

But if he holds them out to the world as part of his family, he will be
 considered as standing in loco parentis, & liable upon a contract made by his
 wife during his absence abroad for the maintenance & education of such children

3 P. W. 1236.

But such maintenance is good consideration for a promise by such children
 when they come of age to repay the expenses of their maintenance

4 Cro. R. 76.

As to how far a father is liable for necessities furnished his children
 living with the mother apart from the father vide 3 P. W. 1232 -

Lecture 34th

In a last cases husband & wife must join, continue.
3^d When the wife is the suffering cause of action & the husband sustains the consequential damage, she cannot be joined in an action brought for such consequential damages: as in case of Slander of the wife with special damages to the husband.

So in case of an assault & battery of the wife

per quod se - here the action would not survive.

This latter action has generally been called Trespass

vi et armis, it seems: but it is strictly case.

If battery is committed upon husband & wife, they cannot join for the whole injury: for the wife's battery they can ^{separately} but for the husband's they cannot.

But if in this case, separate damages are given for the battery of each, the husband may recover as to his battery, & then, it being after verdict, he may have judgement with the wife for her battery.

So if as to the husband the defendant be found not guilty, the verdict is good.

The husband may sue alone, on a promise for consideration of forbearance, to pay a Debt due to the wife as sole wife or due to her as Executrix.

Sic. 346. 1 Com 572.
Balk 206.

160. 89. 2 Holl. 56. 2 Pol. 326.
1 Rev. 140. Kibb. 79. 2 do 387.
160. 501. 508. 1 Ho. 306. 1 Com. 570.

Exp. 345

2 T. R. 167. 1 Law. 10. 13.

1 Com. 573. 60. 357.
501. Jones 440.

1 Vent. 328. 60. 357.

1 Com. 576.

160. 166. 2 Vent. 29. 60. 357.

1 Com. 576.

1 Com. 572. 60. 110.
Balk 117. 60. 462.

Baron & Feme

Exp 342 & 4 Dec 1057
Bulle 17. Day 16 Jan 169

So for adultery with the wife

Exp 343, Bul 27

Many circumstances aggravate the damages
e.g. the rank of the Plaintiff - the wife's previous good
character - the peculiar turpitude of the defendants conduct,

4 Exp 4. 1. 6. 16. 237.

Bul 27. 47 R 681.

1 Law N. 11. 47 R 116

And many circumstances tend to mitigate the damages
e.g. the wife had previously eloped - that she was
a prostitute - that the husband turned her out of doors - that he
was familiar with other women &c -

1 Law N. 11. Bul 27.

4 J A 681 -

If the husband consents to the act, or if he
permits his wife to live as a prostitute the action
does not lie. For cases of adultery where parties live separate or
separate maintenance see 5 J. 357, 6 East. 11. 244.
entirely

Mr 61. Exp 407.

Trespass by the husband alone for breaking
his house & beating his wife, is well laid - the
beating the wife is only aggravation -

2 Bul 119. 6 mod 127.

1 Bos. 306. 7.

Co contra, in an action by the husband & wife for
imprisoning the wife per quod the husband's business
remained not done to their damage &c, was holden good
after verdict - the per quod was only by way of aggravation.

2 Bul 1236. 1 mod 328

Mr 61. 229. Brodley

133 -

If the husband sues alone when he ought to join
the wife or join her when he ought to sue alone, the
mistake is not cured by verdict; judgment may be entered
or writ of error brought -

3 J A 687. 5 Bos 133.

Lord 1641 -

But if the wife sues alone & her husband ought to be joined
with the husband, Defendants can plead only in abatement.

Baron & Seme

11 Ba 307

The right of action being strictly her, the husband may have error, if judgement goes against her -

In what cases the husband must be sued without the wife -

11 W 443. 3 mod 186

Roll 351. 11 mod 701. Allen 72

35. 7 J R 348. 1 Keble 281

440. Croker 116. Co Litt. 351.

11 mod 574. Co Litt. 133. 351^h11 mod 575. Co Litt. 351^h

11 Ba 367. 11 W 133. 11 mod 575

575

11 Ba 301. 11 Ba 307. 11 mod 575

11 W 149. 11 Ba 1237. 11 W 6. 11 Ba

312.

1st It is a general rule that the wife must be joined when the action would survive against her otherwise the husband's representatives might be injured ex. gr. Debts due from her ante nuptias.

So for her torts committed before coverture.

So for rent due from her before coverture.

So in general in all actions to which the wife was liable before coverture.

So for torts by her alone during coverture without the husband's privity.

If a lease be made to the husband & wife, the action for rent accruing during coverture, is against both - for if she should survive she might confirm the lease, & then the rent would survive against her. as I think.

11 Ba 575. Roll 348.

345. 350. 1 Ba 307.

2^d But regularly when the cause of action would not survive against the wife she cannot be joined. ex. gr.

If a feme sole leases, manes, the husband is sued alone,

Sept. 106. b. 100 fac 203 Even if the mistake is not pleaded in abatement & it may be assigned in error, & a motion in arrest of judgment is granted. ^{It seems the mistake, however, the husband does not abate, but the wife may be taken in error with regarding the husband's 2 ff. 511. 4 ff. 521. (in fac. 323. Bar. & Feme).}

1 ff. 511. 4 ff. 521. (in fac. 323. Bar. & Feme).
If a feme covert being sued alone, pleads coverture & prevails, she may have execution for costs in her own name, or by scire facias; her husband & she may have execution together.

Dang. 6/4.

Cap. 218. b. 100 fac 239

Dang. 6/4.

Wife when sued with her husband cannot plead alone - the husband must join. In. Suppose she is sued alone, then it seems it is otherwise.

As to the wife's relief when taken alone, or with the husband on mesne process vide supra.

Of wife's power to Devise real property in Coverture.

By their statute all persons of full age right understandings & not legally incapable, shall have full power to make their wills & testaments & other alienations of their lands or other estates: the meaning of "legally incapable" is incapable of devising devisable property at Common Law. Note, the construction given to the words "all persons" in Statute 32 Henry 8. Pow. Dev. 141 i.e., all persons capable of disposing of real property by other modes of conveyance - but the husband by coverture may have been in the way -

Baron & Feme

Lynd 73. In 28th 1558

2^d Femes court were capable of devising at Common Law
whenever was devisable if marital rights would not be impaired
by it.

21st. 377

The question then is, what power had femes
court at common Law? before feudal tenures femes
court, it seems from two English customs, might at com-
mon Law, devise Lands - Lands being devisable before
the conquest.

During the feudal tenures, other property
was devisable, & even by femes court, when they held
property over which the husband had no controul.
Ex. gr. Personal property given ad uxorem ecclesie
by way of dower: - 1st choses in action without consent
of the husband. In. 1. mod. 211. But even if with consent
it proves that there is nothing in the nature of coverture
to prevent except the husband's right to the property may inter-
fere - Case in modern since the Statute of 29 Charles 2^d
by which the husband is entitled to wife's choses after his
death - 3 Personal property to him sole & separate
use - objection, Feme sole quoad hoc - answer, why
then may she not devise lands? -

11es 518. 190. 303.

2do 75. 11es 3rd 10.

3ask 695. 709. 11es 3rd

204. 13th 126. 740.

4th At common Law she might bequeath such
personal property as would accrue to her on his death,
if she survives, the will would be good - Quare -

2 East 552 -

Baron & Ferme.

14th 34% broda. 219.376.
 1st 1/4 101.111. 30% 4da
 53. C. Lawrence. Boston 60. (no
 219. 1mo 211. Moore 340
 17th 608.912. Plu 346. 181.
 3alt 617. 204-82. 216.
 18th 245. 2da 253. —

So his personal property she may bequeath
 with his consent

His right to devise is established in Connecticut
 by the Court of Errors, & on a petition for a new trial
 was recognised by their Legislature —

Of the Celebration of Marriage.

Marriage is a civil contract at Common Law.
 By Statute of Connecticut publication is necessary either in
 some meeting or assembly or where the parties or either
 of them reside, or by written notice sent to about the
 Church 8 days — In case of minors, publication & consent of
 parents or guardians necessary — and parties who solemnize
 solemnize marriage within their respective counties.

Clergymen or celebrant marriage contrary to statute the
 marriage is void, but generally incurring — How if any other
 person celebrate? Generally thought void. But quare —
 Before the Statute of 1820 if unauthorized persons
 solemnize marriage Kings Bench would prohibit the ecclesiastical
 civil Court from making it void Statute 38. That Statute
 provides that marriages contrary to its provisions are absolutely
 void — yet the Court would not grant administration of the
 wife's estate to the husband. By this authority it would seem
 void — by the former good. In questions purely civil
 when the fact of marriage comes into dispute, common
 reputation of marriage is sufficient. In case of crim. con.
 an actual marriage must be proved. No act of criminal action

18th 120

4th 205% —

Aug 162 —

Baron and Feme

of void & voidable marriages

Impediments to marriages in England are of two kinds -
 1st Canonical, Consanguinity, affinity, incestuosity -
 Precontract seems to have been abolished - But the other
 impediments seem to have been derived from the divine law
 & therefore cognizable by the spiritual courts.

They are sanctioned however in England by statute
 32 Henry 8 which prohibits all marriages prohibited by
 God's Law - It is declared in this statute that nothing
 God's Law except shall prohibit any marriage but within
 the Levitical degrees - there are the same as to consanguinity
 & affinity - Nothing God's Law except shall prohibit mar-
 riage without these degrees - This exception probably
 includes incestuosity - It being an impediment in the
 divine Law Canonical impediments render the marriage
 only voidable during the lives of the parties. Afterward
 King's Bench would prohibit -

Co Litt. 33 -

Salk 548.

Vaughn 242

All persons lineally descended are prohibited -

Gillb. 158 -

Among collateral, the most distant degree is that
 between uncles & nieces & vice versa.

Rule - for ascertaining what marriages are
 lawful among collaterals - so far as relates to
 consanguinity & affinity. Not to marry a collateral
 relation in the first or nearest degree to a relation in the first
 lineal or collateral relation.

Baron and Feme

See E.C. 228. Vol. 151.

Co Litt 235. Baron as to affinity
See under note 235 L.C. Com.

1 Roll 340. Cant. 271.

Path. 124. 548

One marries the daughter of his former wife's sister -

If no divorce takes place during the lives of the parties, the issue is legitimate

In Connecticut a man may now by statute marry his wife's sister & vice versa -

Divorce for the above causes a vinculo or, an a deviation from the rule. 1st Prior existing marriage
2nd Want of age - 14 & 12 years is the proper age - 3rd Want of consent of the Parents or guardians 4th Want of reason, want of license or These under marriage void ab initio - no need of divorce.

Prior marriage - Bigamy in England is felony - & it is here severely punished. 2nd Want of age - marriage may be ratified without another marriage - But they may also disagree & dissolve it without divorce - When either

Co Litt. 79.

1 Pl. 426

comes of age, he or she may declare the marriage null - & if one is an adult, he is not bound by the obligation until he marries.

3rd Want of the consent of parents or guardians; this is common Law is no impediment, but is made so by statute. The Law here is very different in this respect from the English -

1st Marriage within the prohibited degrees is absolutely void, of course the issue is illegitimate. 2nd want of consent of parents or does not render the marriage void, but only subjects the clergyman to a penalty, it does not affect its validity. In England it is void -

2 Roll 147. 152. Roll 114

Co Litt 179. note. 80. note.

2 Burr. 2030

unless there is a public celebration of the vows. 3rd Precontract is not known to our Law. A marriage celebrated in another state to evade our Law is good here, for so our Law be not complied with, that of another state is -

Baron and Femme -

of Divorces.

(Divorces are of two kinds - a vinculo & a mensa & tho
 the first is total; the second is partial. The first
 is a complete dissolution of the contract: the second does
 not dissolve the relation of Husband & wife, but merely
 separates them. In England the first kind is only for
 the canonical impediments above, & existing before marriage
 as is always the case in consanguinity; not supervenient
 as may be the case in inebriety & affinity.

The causes of partial divorce in England are
 cruelty, cruelty, & well grounded fear. Parliament
 of late, grants total divorces for adultery. In these
 cases, divorces are in the Ecclesiastical courts.

Palk 123. 490 356.

After a partial divorce, issue born is
 presumed to be illegitimate - tho it is rebuttable.

In case of voluntary separation, the issue is
 presumed to be legitimate. In Connecticut divorces
 are generally granted by the Superior Court - but total
 divorces only in case of 1st Fraudulent contract. 2^d Adultery.
 3 Three years, wilful absence, with a total neglect &c.
 4 Seven years absence, unheard of -
 5 Three years absence when on a voyage usually performed
 in three months, unheard of or heard of under such circumstances

Baron & Temer

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Of the Consequences of Divorce as to property.

8th. 133 -

In England in case of a divorce a vinculo the wife has no dower - nor any saphors out of the husband's estate - for *ubi nullum matrimonium ibi nulla dos*.

12th. 6 -

After a partial divorce for any cause she has her dower - she also has alimony - settled according to the discretion of the Judge. I suppose the Law is the same here.

But in case of total divorce, in Connecticut, for adultery, the wife has dower if she is not the fault party. also a part of her husband's estate, not exceeding one third, may be immediately assigned her for alimony. It has been adjudged by our Superior Court, that personal property may be assigned to her (& confirmed by Ct of Errors)

So whenever the marriage is within the Licitical degrees, the Superior Court, may assign a reasonable share

vide p. 156.

Co. Dec. 77.
205.

On a promise made to wife with husband's consent & that she is the meritorious cause of the act - for work & labour done by her, husband & wife may sue jointly - by expressly stating in the declaration the cause of action & the promise - & the wife - tho in this case the act would survive to the wife. But care must be taken that the declaration contain no other cause of action against husband alone. 2d. 424.

Parent & Child

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Lecture. 1st

This title will include "Guardian & Ward"
According to the Common Law, & our own,
an Infant or Minor is any person, male
or female, under the age of 21 years. The age
of minority is fixed at different times in different
countries - by the Roman Law it was 25 years -
But here at the age of 21 an infant is sui juris,
he is then of full age, & capable of acting for himself.
we will first consider.

The Privileges & disabilities of Infants & Minors

II. as to crimes. What is criminal in an adult is
sometimes not so in an Infant. It is an invariable
rule that at Common Law, no person under the age
of 7 years can be punished for any offence whatsoever.
He may commit a forbidden act, but not a criminal
one because he has no freedom of will - The Law
presumes he has no will: & nemo pro reo, nisi mens sit rea
No person can be punished for a crime, unless there is
an intention concerning with the criminal act. as there
can be no will in this case, there cannot be any
punishment. At 14 an Infant may be punished
for a crime as well as any other person; because

1 Bl 463 Lib 104
259

4 Bl. 26 & on 1 Bl 464

1 Hawk 31. 21-

Hal. P. C. 25

1 Inst 247^b

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He is then supposed to have arrived at a sufficient age, to have a will of his own. Between the age of 7 & 14 it is called a "dubious period"; & it has always been a question of fact, whether the infant is doli capax capable of committing a crime.

The presumption of Law is, that he is not doli capax, but this presumption may be rebutted;

1 Hal Pl 20. 26 & when proved, the maxim is, malitia supplet aetatem.

434 Foster 70. 72 The onus probandi, however lies upon the prosecutor.

The presumption that arises in the cases of Infants under 7 years cannot be rebutted: this presumption is de jure. According to some opinions this

4 Pl 23. 1 Hawk. 10 1/2 years: between 7 & this time, it is in favour of the infant. between this time & 14 it is against him.

If there be such a difference, it only shifts the burden of proof in the latter case from the prosecutor to the Infant. But there appears to be no such distinction in the English Law, tho' it existed in L. Roman.

The rule is exactly as laid down above. It is observed by Blackstone & Bacon that in some cases infants

4 Pl. 22 -

3 Bac. 130 -

over 14 are privileged as to misdemeanors which are not capital - They do not lay down what cases - & Mety.

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thinks they are cases of omission, because Infants are excusable for omissions where adults are not. It being a general principle of Law that infants shall not be punished for mere omissions, or neglect. — It has become a standing rule or maxim that, in the administration of criminal Law, an Infant shall not be convicted on his own confession without great care & caution. So jealous is the Law of the rights of Infants. The Judges in this case are said to be his counsellors; & they have gone so far that where the infant has confessed the crime in Court, the Judges have ordered the plea of "not guilty" to be put in, & the cause to go on to trial.

How. 19. Inst. 439 Comh. It is said there is an instance in the books where 222. Hal. 25 & on — an infant under 7 years of age was pardoned for manslaughter, but this proves nothing, he is fully answered by Bl. 4 Bl. 337.

The presumption in favour of infants over 7, it has been observed may be rebutted — for it is only a "presumptio juris de facto", whereas under that age it is "presumptio juris de jure". Some hartaenda provisio was necessary to be fixed, in order that opinions might not be vague.

With regard to general Statutes inflicting corporal punishment on Infants, a material distinction is to be

See Jac 466

Foster 40

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observed. In some cases they are punished under them, tho' not named, & in others they are not. It is rather difficult to lay down any precise rule on the subject, but Mr. G. thinks this the most correct one: "If the offence created by the Statute is made such, as is punished corporally by the Common Law, infants are within it & may be punished under it." But if the Statute prohibits an offence not punished at Common Law corporally, & inflicts a corporal punishment without creating an offence so punished at Common Law, Infants are not within unless expressly mentioned. The reason given is that the punishment is collateral to the offence. This is not sufficient. The true reason is, doubt of Law in construing penal Statutes, will not allow the privileges of Infants at Common Law to be ousted by mere implication. These are the leading distinctions respecting public offences, as now come to consider II. How far the Infant is liable for torts, or civil injuries — I conceive they are liable at any age, Civile; if committed with force and the reason is, the Law in redressing an injury does not regard the intent with which the act was committed. Criminal Law regards the intention,

1 Hal Pl. 21. 22

1 Inst. 247. 357-

Plowd 364

Cro Jac 274

19 Vin. 501.

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1 Don't. 81

1 Hank. 3

2 Roll 347

but in the case of civil injuries it is not so -
 the enquiry is not whether he intended to do it, but
 whether he did do it - Tho the intention may ag-
 gravate or lessen the damages - There is one case
 in the Books where an Infant of 4 years of age was
 sued for an assault & battery & it was not contended
 the 1st action would not lie.

9 Vin 395

There is a distinction in principle,
 between the case of a public & private wrong. This
 wholly repugnant to our ideas of justice that person
 should be punished for an offence when there is no
will. But in the case of a civil injury, it is equitable
 that the party injured should have a compensation.

It has been adjudged that an Infant of 17 is liable
 in an action of Treason, & from this case it has
 been inferred that one under 14 is not liable - This
 inference is illogical; & farther there is no case in
 which an infant under 14 has been tried. Now I conceive
 that an Infant is liable for Treason whenever he is
capable of making "dolus capax" - I can see no objection to his liability.

3 Bac 132

Is an Infant liable civilly for his frauds & deceit?

1 Lid. 29. 258.

1 Lev. 189 Term 71.

W. Gougeon thinks he is not. Because if he were, his privilege
 as it respects contracts would be destroyed or abridged - It is
 unsafe to subject for fraud or contract, when it is a

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1 Heble 788.905 general rule that he cannot make one - He is, to be sure liable as a common chest, whenever he is "doli capax" - In one of these cases, it is held that an infant is only liable for those torts

1 Heble 914 which are attended with a degree of violence. This cannot be true; because he is subject to an action of Slander where there is no violence - All the decided cases go in support of this rule, that an infant is not liable for his frauds delicta. Lord

3 Binn 1802

Peake's Rep 223

manifested & Lord Kenyon (as also Judge Pease) disapprove of this rule. The former says the privilege of infancy was given as a shield of defence & not as a weapon of offence. Lord Kenyon says, obiter, that an infant should be liable in an action sounding in contract, if it arose ex delicto - An action sounding in tort merely

8 TR 335

cannot be sustained against an infant, where the cause of action arises ex contractu for the foundation of the action is the contract, which he cannot make -

12 Vin 223

It was once held by Parker & Levor justices, that if an infant would take upon himself to trade & act as of age, no evidence of Infancy should be admitted, because it would be to take advantage of his own fraud. This cannot be law, as laid down, because if it were it would

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subject an infant to his own contracts. His contracts as such, would bind him in all cases -

13 Vin 586. 1 Honbl
70-1. 9 Brod 38. 2 Eq 71
Canal Br. 489. 1 Bro Chan 9
358. Part 179 —

It is agreed in some cases, that Chancery will decree a contract to be good against an infant to prevent the consequences of his frauds - This is, however, (Willy thinks) a rule of Equity - a Court of Law never would do it - It is left to the discretion of the Courts -

1 Honbl. 71.
1 H. Bl. 75 -

But a Court of Chancery can never hold an infant to his contract to prevent the effects of fraud, where it is absolutely void - because that would be to make a bargain for the parties. The last rule, some which apply to these contracts that are merely voidable

Lecture 2

The Infant liability for contracts, & other particulars
At Common Law, the age for choosing Guardians is 14 in both sexes - Before this time they have no right of choice - In Connecticut this rule is introduced by Statute, & males are of age for choosing Guardians at 14 & females at 12 years - According to the English Law, an Infant may be an executor at any age, even an unborn infant,

1 Bl 463 -
2do - 89 -
5 Co 29 Barth 466
La Pl 338 -

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may be appointed, & the appointment will be good: But altho he be appointed & has all the rights of an Executor, he cannot exercise the office till he is 17 years of age. Consequently when one under this age is appointed, and administrator "durante minoritate cum testamento annexo," must also be appointed.

No person can be an administrator, until he attains the age of 21 years: and the reason given is, that an administrator must give bonds for the faithful fulfillment of the duties of the office, being appointed by Law, whereas an Executor at Common Law, need not give bonds, not being appointed by Law, but by the Testator.

In Connecticut, it is questioned if Executor can execute his duties of office, until he also is 21. because he is, by their Law, required also to give bonds for the faithful fulfillment of the duties of his office.

Under their Statute also infant at 17 may make a will of his personal property.

The age of consent to marriage is 14 in males & 12 in females. No person under such ages, is bound by contract of marriage. & if one is over & the other under

West. 23. 307. Lovel
155. 2 Bac. 375-7.
1 Com. 235. Co Litt. 124-
3 Bac. 121. Went 213-
Godolph. 102. 2 Bac. 331
Hobbs 250. Forb. 76-
L. Co. 27. n. 291
Ho 24. Cumb. 475
Bartl 446. 73 mod
395. 12 do 194. 501.
Salk 39. 2 Bac. 381
3 Bac 121. Lov. 5.
La R 338-

1 Inst 79. 1 Bl. 436
463. Str. 937-

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This age, one may dissent as well as the other, because
Litt. in. 36. 2 Pl. the agreement must be mutual: according to the
131. 1 Pl. 463- English Law a female may be betrothed at 7 years
if she is, & when her husband dies, she is above the
age of 9, she may be endowed out of his estate -
The age of disposal of personal property by will
in England is said by some to be 14 in males & 12
in females. By others ^{14, 16, 17, 18} The former seems
to be the better opinion. If, of those ages, & sufficient
discretion, they may make a valid disposition of
personal property. Full age, as was before observed
is 21 years; this is completed on the day preceding
the 21st anniversary of his birth. The Law makes
no fraction of a day. The day of the birth being over
included, it cannot be again, & it makes no difference
whether it be born the former or latter part of the day.

With regard to contracts, it is a general
1 Pl. 465- rule; that no person under the age of 21 years
can bind himself by a contract. Regularly then
the contracts of Infants are not binding & are either
void or voidable. But if an adult joins an
1 Rest. 58. Infant in a contract, he is bound, tho the Infant is not.

left privilege in person: & can't be exercised for him by another. 2 H.B. 575
per Exr. Co. 2 & 4 Exr. N.D. Cur. 187 per
Ed. Tollenborough C.T. consequently
attorney can't plead Infancy for
Def. 21. 1 Selw. N.D. 109.

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1 Sid. 41. 446 -

Row Con. 38 -

1 mod. 25. 20th 937.

3 mod. 248. Vent.

51. Geo. Bar. 502

Row Con. 39. 40 -

Quinn 393 -

If then an action is brought on this Contract the adult cannot plead that an Infant is joined with him. So if an adult makes a contract with an Infant, the former is bound, tho' the latter is not. And if an action is brought on this contract, the adult cannot plead that the Infant was not bound on his part. The Infants assent is deemed a sufficient consideration, to support the contract. This is so, considered in Chancery, which will compel a specific performance on the part of the adult. Tho' Wily presumes this Court would also compel the Infant to do Equity.

This is a general rule, but it is not universal. For if the Contract is absolutely void, the rule will not hold. The chance of a benefit is always a sufficient consideration to raise a promise, as in the case of a voidable Contract made by an Infant: & therefore, the Adult is bound, because it is only voidable. But where an engagement is strictly void on one side, it raises no consideration to support the engagement on the other: Therefore if an Infant makes a contract which is absolutely void, a legal non entity, tho' being no consideration to support a stipulation on the other, the adult is not bound.

Str 938 -

Row Con. 39 -

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3 Bar 140. 141. And it seems well settled that if the Infant after having
 1 Lid. 129 ~ made a contract, recovers the consideration moving towards
 1 Lev. 169. Keble 905 him, & afterwards avoids the contract, he is not bound
 Keble 913 ~ to restore the consideration which he has received. the
 Law deems it a gift to him. It has however been

disputed whether an action of Trover would not lie
 where the consideration was specific, or an action of
Indebitatus assumpsit where money was paid, on the ground
 of fraud in the Infant. The Books do not warrant
 the idea that either action can be supported. writ
 might deprive the Infant of his privilege, & enable
 him & the adult to change the nature of the consideration
 from that not of a specific to a specific nature,
 & oblige the Infant to refund the consideration out
 of his estate: by which means he may always embroil
 the whole of his Estate, if he can find adults to trade with
 him.

1 Inst. 172^a
 1 Lev. 86-7.
 Boulin 34-5
 Cro Jac 494. 1 TR 41.
 1 Bl 466. 8 TR 148
 1 Esp N.B. 212.

Thus it is a general rule that Infants cannot
 be bound by contract, there is one exception, in the case of
Necessaries; it being a general rule of the Common Law
 that for necessaries an Infant may bind himself.
 This is done to prevent his suffering - These necessaries
 consist of certain enumerated articles, which are all
 included in these five: Food, Clothing, Lodging, Medicine & Instruction

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3d. B. R. 118. to make a contract for a debt incurred for repairs to a house - see more 3d. B. R. 177. 2d. B. R. 60.

It is solely liable for necessities, & here the father resides in the country & in 1780 if the father allows him a reasonable sum for his expenses. 2d. B. R. 47. 1do. 17.

The reason why an Infant is not bound by his contracts is, a fear that he will squander away all his property. Some time must be fixed, which by Law is 21. And the presumption that there is a supposed necessity before it cannot be rebutted, except in the case of necessities when a contrary necessity exists. But these necessities must be necessary for him at the time of contracting.

What are necessities the Court will determine from the Infants situation & rank in life. The provision must always be reasonable, & in all cases where the

See 168. 6th. 161.

8 J. R. 578

6th. 583-

6th. Jan. 560

151-

Calm 361-

17th. 62. 6th. 612

1101. 6th. 110. 111-

4th. 117-

Idea of Infancy is put in, it is matter of fact, to be left to the Jury whether the quantities were or were not necessary. Hence it is, that where the Defendant pleads Infancy, the Plaintiff may plead generally that they were furnished as necessities; whereas where it is a question of Law, the Plaintiff in his explanation would have to plead & specify what the things were, which he furnished.

Am. 168. 6th. 161.

161-

161-

161-

161-

161-

161-

161-

An Infant may bind himself, under these restrictions, for his wife or children, necessary. He has the same power to make contracts for them, & be bound by them, as he has for himself - as he may marry, so he may bind himself for articles necessary for their comfort & convenience. An Infant is also bound by the contract of his life

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made before coverture. Yet he must have
been bound himself before marriage —

This exception must be understood with
certain qualifications; for no infant can bind
himself for necessities if he is under the care
of a Parent, guardian or master, if duly provided
for — neither is it true that he may bind his

Lodge's Story of the "Lionel King"

Parent, guardian or master, when they do not
furnish such necessities as many may think proper
Here much is left to their discretion, but must
be clear that he is not duly provided for —

From what has been said, it follows that an
Infant can bind himself only in three cases —
1st If he has no Parent, guardian or master, that is
bound to provide for him. 2^d If he has one, but is
out of the reach of his care. 3^d If he has one, & is
within the reach of his care, but is so illly provided
for that he is suffering, or in danger of suffering —

In the two last cases, the Parent, guardian or
master is liable on his contracts. — In Connecticut
there is a Statute, which is supposed to introduce a
new rule, as to the Infants power to bind himself for
necessaries — It has introduced one thing new, by compelling
Parents &c to fulfill the contracts of the Infants made

Kirby 251. 287.

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on his own name, when they permit him to contract. But the question is, whether in any cases under the Statute an Infant can bind himself for necessities by his contracts. The Statute says "a minor under the government" In case he has none, or has disowned himself, he is clearly not within the Statute, & if he has one, but is otherwise provided for, he must either be thrown upon the resources of the poor as a pauper, when he has property to an indefinite amount, or must be allowed to bind himself by his contracts. I think the latter is right & I am fed. clearly

Lecture 3²

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Low Co. 36

Crilly 20-

can be looked into, & therefore the Infant would at all events be obliged to pay the bond & since he has executed, without being permitted to deny that the condition of the bond was for necessaries. The privilege of the Infant would be wholly destroyed. The reason there, which runs thro' all the cases is, if the consideration is such as is examinable, he is bound, but if the nature of the Contract excludes all enquiry into the consideration of it, the infant is not bound.

(I say a single bill he may bind himself. It is

3 Keble 382

416-423-

J. v. 186-

L. v. 186-

true that a single bill is not now examinable, but it formerly was & at the time when the rule was laid down that he might bind himself by it. I find no cases in which it is said that an Infant cannot bind himself or that a single bill is not examinable when an Infant is the obligor.

3 Pay a negotiable note, actually negotiated,

Kingdon v. Wells 155.

Doug 614. Ford 73.

Wood 403. 2 R. 71.

Crilly 9. 51. 82. 87

Peakes R. 61. 216.

Corp. R. 117. 262.

He is not bound, because, as between the endorsee & maker no enquiry can be made into the consideration - If then he was bound, the principles of the Mercantile Law would so far forth be overthrown or his privilege must give way - But suppose the note is not negotiated? He is bound by it, because the consideration may be looked into, while it continues in the hands of the promisee. It is a mere single contract on the principles of the Common Law.

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vide ante

Latel 169. Nov 87
600 fac 602. Pro bon
36. Doubt 73. J.R.
40. 41. 42.

4 By a Bill of Exchange before it is negotiated, he is bound; after it is negotiated he is not. This is the same as negotiable note
5 By an account stated he is not bound. The items of an account may be looked into; but the reason of this rule is, that they were settled before when they were not examined; & so it is said by Lord Mansfield. This is one of those cases in which the rule continues after the reason has ceased.

These different cases are found to support the general principle. But still there arises a question whether in those cases, where by the form of the contract the Infant is not bound, he is bound by the original simple contract? as in the case of a formal Bond. By this he is not bound. Can he be sued in an action of Indebitatus assumpsit for the necessities which were the foundation of the bond? This depends upon another question, whether the bond does or does not merge the simple contract? & this upon another, whether a formal bond of an Infant is strictly void, or only voidable. The decision of this question, will decide the first one. If it is voidable it does merge it; if it is strictly void, it has no effect at all upon it. This question will be considered under another division of our subject. Suppose the bond is void then I conceive the Infant is bound upon the

It is the same if the signs -
formal or verbal instrument with
no doubt but the adult may be
sued upon it, & no notice be
taken of the Inf 3 Esp. R. 76. 110. 47.

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Exp. 90. 175. 176.

Row con 208 to 16

1 Inst 172^d note

3 Brum 1078. 11 M 462

Ed vide 3 Keble 798. Bul.
N. C. 175. 1 Blw. 111. m. 82.

original contract, express or implied. This is agreeable to principle & all analogy: for it being a legal non-entity, there can be no merger. Mayd community does not destroy that which is good - That which is strictly void, does not destroy a higher right

Exp 164. Bul. 10. 115.

Row con 213 -

A single Bill does certainly merge the contract. If he has taken a security which is not void, & by this or nothing, he must recover - Our Law is the same with the English in point of principle. There is however here one class of cases, in which it is a little difficult to know what is to be done - A note of hand is here a deed - It is of the same solemnity as a formal bond in England. Is the 3 part bond by it? It has been decided formerly that he was & that he might be allowed to go into the consideration of it. Another question has arisen, whether a note given by an Infant is void or voidable? In Connecticut, it has been decided that it is not void. The S. C. Courts have decided that you shall not sue an Infant on a note & to a plea of Infancy, reply a promise after full age, but that you shall sue him on the original promise - This is contrary to the decision in their Superior Court. If our note is void they do not merge the original parol contract - If voidable they do merge it. The former is the opinion of Mr. Gould.

1 Inst 58 -

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Lecture 4th

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Don. Don. 37. 10 mod
67. Talk 279 386-
6/100 368. 69/100
516. Don 583 558.

The Infant can never bind himself for money lent unless the money is actually expended in the purchase of necessaries. At Common Law, the Infant is not bound for money lent unless he has actually expended it himself for the necessaries - in which case the infant purchases rather than borrows - But in Chancery if the money is actually expended for necessaries, the Infant is bound to refund as much as the value of the necessaries, not as the case may be, the whole sum loaned. Here the lender of the money stands in the place of the vendor - & will recover as much as the vendor would have done, had he furnished them a credit - which is the real value of the articles -

See Jac 474 Talk 279
Roll 729. He 1083.

It has been decided that where an Infant uses a mechanic & purchased articles to carry his trade he was not bound - The Law presumes he has not sufficient discretion to make a Contract, & the articles purchased were not necessaries in Law -

3. Talk 196 -

So also an Infant is not bound to pay for repairs done to his buildings. These repairs are not necessary - they may be done by his guardian -

See Jac 320 -
2 Bull 69 -
Don 60 35

It has however been decided, that if an Infant takes a lease of a house of Land, & lives in the house until the next day arrives or improves the Land till that day, he is liable in other case to an action for debt on the rent provided it is reasonable, i.e. does not exceed

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one year's value. The house is hired for the purpose of Lodging, but I do not see the reason of this decision as it respects the Land -

The necessary education an Infant may learn himself - but what is necessary in one case, is not so in another - It differs in different persons - It is a matter of fact to be left to the Jury under all the circumstances of the case - A liberal education in England would be considered necessary for the son of a nobleman, but not for the son of a poor man -

So in Connecticut it was decided that, where a man of Landsown estate & expectations who lived separate from his family left his son to the care of another who had married the mother, & the step father educated him at Yale College, the Parent was liable for the necessary expenses of the education - It has been decided that instruction to an Infant in Musick & Dancing was not necessary - I doubt if this is now Law

The manners of persons are materially changed - I apprehend that instruction in any proper branch of education, according to the rank in Life is necessary - If an Infant does voluntarily what

3 Ben 1801-2

1 Inst 172. 315 a

1 Ben 1794. 460. 85

St. R. 545

he is bound to do, either in Law or Equity; he is bound by the act; tho regularly he is bound only for his contracts for necessaries -

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Thus if an Infant holds lands in jointtenancy or in common, & makes an equal partition voluntarily, he is bound by it, though it is inequitable, & unequal & injurious to him, he may be relieved against it. So if an Infant purveys where by Law or Equity he is compellable to do so, he is bound by it, as where he takes a lease by succession under the Statute of distributions. So where he takes an estate of inheritance subject to an annual rent. Here he does not make the contract, but holds under one made by another. So if an Infant sets out Dower, he is bound by the act, unless to his advantage has been taken of him, or he has set out too much. So if an Infant mortgages, re-conveys, upon payment of money, he is bound by the reconveyance. The reason of the rule is, that as he is bound to do the act, it would be idle & expensive not to leave his voluntary act stand, when he may ^{be} compelled to perform it the very next day by process of Law.

An Infant when Defendant in Chancery is bound by their decree against him, except that he has

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"a day in Court" after he attains full age, to
 impeach the decree either for fraud or error
 & this day in Court is six months after he
 attains full age. The onus probandi lies on him
 at Law, he has no more a "day in Court"
 than an adult has. He has here no particular
 indulgence allowed to him.

2 Vern 326 429
 2 vent 351 q mod
 128. 10 Wm 504
 2 do 401. 3 do 352

An Infant Plaintiff is as much bound by a
 decree in Chancery as an adult or as an Infant is in
 a Court of Law, unless he can show fraud or gross
 neglect in his prochein amy. He has no day then
 as a matter of course when he is a Plaintiff except
 to show fraud &c as above. The reason is, when Off-
 he acts voluntarily, but when Defendant, he is
 compelled to appear, he acts in involuntum.

3 Atk 626 -
 1 Houl. 75 -

These rules which I have laid down with regard
 to Infants ability to contract, presuppose the
 contract respects his own Interest. Therefore,
 it is a rule that those acts of the Infant which
 do not affect his own interest but take effect
 from an authority which he has a right to
 exercise, such acts are binding. Thus if an Infant
 Executor collects a Debt due his Testator, or pays

3 Brn 1802

one actually due from the estate, he is bound by the act. So if he discharges a debt upon full payment, the discharge binds him. So an Infant may exercise many offices, & the acts he does in his office bind him.

When the period of the Infants legal indiscretion ceases, he may regularly ratify those acts which he has done before & by which he was not before bound. Thus a promise after full age, to fulfill a contract by which he was not before that time bound. But this rule does not hold where the contract was absolutely void; for such an one never can be ratified. There is nothing to ratify. It is as though it never had been. It is a mere non entity. It has no existence - as is the case in usurious contracts. But it is not to be understood that where an Infant gives a security absolutely void, that a subsequent

1 Str 690-
2 Str 766
Yonbl 131-2
1 Str 648-
Chittys Bills. 21-

Bull. N.D. 155
Exp. 164-

promise after full age will not bind him - for if he makes a contract which is good, & gives a security which is absolutely void a subsequent promise after full age will bind him. Thus suppose a penal bond is void & it is given for necessaries, if the promise to pay after

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See note p. 80. &
authorities there cited.

Bull. N. D. 155

Expt. 164

full age, he is liable for the necessities -
The subsequent promise attaches upon the original
consideration & lays the foundation for an action.
But this rule does not hold when the security
is only voidable, for the original contract
being merged in the security, furnishes no
consideration for the subsequent promise -
But this only means that the Infant cannot
be sued on the original contract as a ground
of action - There is a very material distinction
between the case where the subsequent promise
is the ground of action itself, & where it is a
good replication to the plea of Infancy on
a voidable security - It cannot be the ground
of an action in itself, because the consideration
must be either the original contract or the
written security; the former it cannot be, for
that is merged; neither can it be the latter
for a parol promise never can attach upon
a written security, which is voidable as a consid-
eration - But it is evidence of a waiver of the privi-
lege of Infancy as to the written security,
& therefore is a good replication to the plea

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of Infancy on the written security, tho' it is not of itself a ground of action - If this is not so, the written security, which by the supposition is merely voidable, is to all intents strictly void - This distinction is not well explained in the Books.

But when an Infant makes a subsequent promise, in consideration of one which is voidable entered into during infancy, he is held no farther than the promise extends - as if he agrees to pay \$1000 during infancy, & afterwards promises to pay \$500 - He is bound to pay no more & the subsequent promise becomes the rule of his legal duty - this differs from case of Stat. Limitations

To a plea of Infancy, a replication of a promise after full age is supported as far as the Plaintiff is bound to support, by proving a second promise - He need not set forth that he made it after full age; it shall be presumed he did & the onus probandi therefore lies on the Defendant - The Plaintiff may not know his age -

If an Infant is jointly interested with an adult in a lease, & the adult procures a renewal

Exp. 164 -

2 Exp. N.D.C. 328.

18 Q. 648-9

3 Bar 132 note

Exp. D. 164 -

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1 Bos & Pul. 376 If it in his own name, he shall be deemed to have acted as a Trustee for the Infant & the Infant may claim his share of it provided it is beneficial, otherwise not. The reason is that leases are generally renewed, & the subsequent lease is a graft upon the old stock.

1 Bos & Pul 480 If an Infant is arrested on a cause of action to which his Infancy is a good plea, he cannot be discharged in a summary way, as a ^{Justice} court may be, but must plead his Infancy. For his Infancy is not regularly absolute, but only ^{rel} ^{modo}.

Lecture 5th

What Contracts made by an Infant are void & what are merely voidable

1 Burr 566 - All contracts by which Infants are not bound are either void or voidable. This distinction is some what artificial, but the consequences resulting from it are material. Of late years Courts have been inclined to consider those contracts by which Infants are not bound as voidable merely, & not void. This is advantageous to the Infant because it leaves it to his discretion to avoid the contracts or not when he arrives at full age. Having then this power there are few cases

3 do. 1805 -
St. 938 -

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low bar 52 or 502

3 mod 310

low bar 33.38-

54. 2 H.M. 571 -

Roll at 720

in which there is any injury to the Infant, his contracts will be considered as strictly void.

The first general rule laid down on this subject is, that those contracts in which there is an apparent benefit, or semblance of benefit to the Infant, are only voidable; & those on the other hand where there is no such apparent benefit or semblance of benefit are strictly void -

This is not I think a governing rule - The first or affirmative part is undoubtedly true -

1 Inst 23.8.

low bar 320 -

2 Vent 203

From it, it follows that the purchases of an Infant are only voidable because they are always presumed to be for his benefit. I know of no exception to this. If this part of the rule were not true, he could not be devisee, grantee, &c. In fact he could take property no other way than by descent. They create a power on his part and are only voidable. Upon the same principle a power of Attorney given by an Infant to accept seisin is only voidable -

1 Burr 1808

Roll of 720

It is ancillary to the completion of a purchase for him -

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And it has lately been decided that an Inaction executed by a Slave to his master promising to leave him faithfully as a servant, was only voidable;

24th. 5th Nov because it might be for the benefit of the slave —
These exceptions all conduce to illustrate the former branch of the rule —

It has however been said that where an Infant made a lease without reserving rent, the lease was absolutely void. This has been laid down as
Moore 105. 3 Leon 216 — Dyer 337. But 102 — May 130 —

10 mod. 421. 424 Saw & from time to time considered as such, but 1136. 533. 12 mod 162 there is not a single judicial decision ^{on this point} to this point.
3 Bar Abr. 304

therefore not the highest authority of what the common Law is. That there has been no judicial decision is said by Lord Mansfield & the Court — This however is not all — there are weighty opinions to the contrary; Littleton himself says (& he never yet

3 Burn 1806 — Littleton himself says (& he never yet
Sitt. ac. 547 — Contrary; Littleton himself says (& he never yet
1 Inst 45. 308 Lev 6. was contradicted by a single judicial decision) that
Moore 78. 5 Bar 535. a lease made by an Infant, may be avoided

that is, it is voidable; & this is laid down with
out reference to reservation of rent. There is

then a weight of authority on both sides of this part of the rule. Lord Mansfield denies the lease to be void. He has not taken up the latter branch of this rule, & proved it to be untrue (for it may sometimes be true) but he has

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advances some arguments which incontrovertibly prove that a lease made as above is not void - 1st The
says L may make a lease reserving rent or not, in
order to try his title. Now if this lease was strictly void
the Defendant or one who was a stranger to the lease
might take advantage of it, but if it was only voidable he
cannot; for it is a general rule, that whatever makes an
Instrument void may be given in evidence &

3 Burr 1806. Double
74. Bl R. 578. 1^{mo}.
25. 2 TR 161. 9 Vin.
393. 394 -

2 An Infant's Lessor can never take advantage of
the Lessor's infancy and avoid the lease - This proves
absolutely that the lease of the Infant is only voidable
for the general rule says that when the lease is strict
ly void, the Defendant may take advantage of it -
It is then clear, on principle that a lease of an
Infant reserving rent or not, is only voidable -

1 Roll 729. See also 920.
Hutt. 106. 6th 2164.

It is said again that a penal bond executed by
an Infant is void - because a penalty can never
be a benefit or cause a semblance of benefit to an Infant.
Now there is no necessity that this should be considered
as void, any more than a lease a single bill.
I do not know that the reason given, viz that a penalty
can never be for the Infant's benefit, has ever been
decided to be a good one - The at this day in England

3 Burr 1804-5. Park. a penal bond would be considered as void. There
are however opinions contrary to this idea -

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On principle however, according to analogous cases I should consider it as voidable.

Talk 279

3 mod 310

5 Co. 119

La R^d 315

3 Binn 1804-8-

At Common Law, an Infant cannot plead non est factum, to a Bond, & give Infancy in evidence under it, but must plead it specially - tho a same court may do this - and it is a general rule, that whatever makes an instrument absolutely void, may be given in Evidence under the general issue - To this rule there are some exceptions, & therefore of no very great weight in the determination of this point.

1 Equit^{ty} Cas 126.

282. 1 Wood^{es} 403-

Houlst 74. 3 Bacc

146-

Pow^{ell} Con 37-

But what furnishes a strong argument against the idea that a penal bond of an Infant is thruly void, is this, that an Infant having made a bequest in his will for the payment of his debts, the Court of Chancery will order that penal bond to be paid on the ground that it is ratified by the bequest - But a strictly void bond never can be ratified - In the opinion of the Court then, this bond is considered only as voidable. I must leave this question nearly as I found it - there is no necessity for its being considered void - Yet on the ground of its having been so long acquiesced in, I believe in England it would be considered as void -

There are the three cases adduced in support of the latter branch of the rule. They have been considered; & I think it appears, that it is at least doubtful.

It is in its nature a very vague one. It is more properly a qualification of another rule. If indeed it is a general rule it is truly a novel one, that includes only one case.

There is however another rule which has been taken subject to a single objection seems to be the true one. The former part of the preceding rule relates chiefly to purchases & is not contradicted by authority or principle. It is universally considered as true. The latter branch which we are now to consider relates chiefly to those contracts which create a duty in the Infant, or convey an interest from him; such as Sales Conveyances, Deeds, Leases & obligations entered into by him conveying away his interest. I give you the true rule of discrimination: it is this, all gifts, grants, sales, Deeds or obligations made by Infants which do not take effect by manual delivery are void. Those on the other hand, which do take effect by manual delivery are only voidable. This rule was laid down substantially by Littleton.

We will examine this by a few examples.

Parkin. sec 12, 19-

3 Burr 1804-5-

Roll 730-

Latch 10-

Litt. sec 259-

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an Infant makes a feoffment, this is
 Confessably voidable not void. But what
 benefit or semblance of benefit is there to the
 Infant according to the general rule mentioned before?

There can be no apparent benefit in conveying
 an infant in his infancy. The presumption is that
 it is injurious to him. He cannot see his feoffee
 for Trespass, but must wait till he arrives at
 full age, & then affirm or disaffirm as he pleases.

- Law. Con. 32-3- But the Law may do it before he is of age. Why
 3 Burn 180-5- there is this merely voidable. I answer, because
 Perk. 259- the intent passes by delivery, & he shall not
 4 Co. 125-8 Co. 42 immediately consider his feoffee as a Trespasser
 1 Foul. 694- after he has done this solemn act. —

An Infant sells a Horse. This contract
 is merely voidable. The delivery is the criterion.
 It is a solemn act of Transfer, which shall not

- Perk. re. 12-19- be so considered as to render the other a wrongdoer;
 1 Mod. 137. Hob. 77- for if the sale was void, he might immediately
 Droll 730- by consider the buyer a tortfeasor —

Latch 10- On the other Hand if the Infant makes
 Hob. 778- an executory agreement to sell the horse, but
 does not deliver him, this contract is void: & if
 the buyer takes him without any delivery he is a trespasser.

But if he does deliver him, the other party, is not a Suspense.

These words, "which take effect by delivery" in the rule, are important as they respect the delivery of a Deed. They are as essential when applied to Deeds, as when applied to Sales; Hence the difference between Deeds which convey an interest, & those which delegate a power. The former are generally voidable, because they pass by delivery. The latter generally void, because they do not so pass. They enable another to carry it into effect.

According to this rule, Gifts, Grants, Leases &c are only voidable as they pass by delivery —
a power of Attorney made by an Infant is void, except one, made to accept seizin or Interest; because it does not convey an interest it does not take effect by delivery —

Powell denies this distinction between deeds. He has no argument on the point, but only says, "the distinction is not well founded" —

From all that has been said, it follows, that all purchases by an Infant are regularly voidable. That Leases, conveyances, Deeds &c are only voidable when they

ut supra

3 Penn. 1808

Pl. R. 597. N. B. 75

May 130

How. Con. 32-3

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take effect by delivery - Secus, when they do not so take effect - On this point the opinions are contradictory & they cannot be all reconciled without very considerable difficulty with any general rule that has been laid down -

The first rule is to be considered as a qualification of the one laid down as above. Lord Mansfield held this opinion -

The general rule then is that those contracts which take effect by delivery are voidable only; yet it is to be connected with the following rule, that when the contract is such a way detrimental that the interest of the Infant cannot be preserved by keeping this distinction, the Court are to consider it as void even tho it passes by delivery - This will exemplify in case reported by Keble

3 Burr 1807-8

Ad R 579-

3 Keble 369

A young woman made a contract, & permitted a Barber to take two ounces of her Hair - it took the whole from her head - here the Court held that the contract was void, & she recovered in an action of assault & Battery. The rule here was properly qualified for her privilege could in no other way be preserved.

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But it is not so in case of a penal Bond, for here it can be preserved.

Executory contracts by an Infant are in general only voidable: as a promissory note, single bill, bill of Exchange &c

Bow Com 38. 2 Str. 937.
Str. 85. Sid 41. Vent
51. Keble 1. —

Roll 730. Lev 17.

And it has been decided that a Bond to submit to arbitrators, by an Infant, was only voidable & not void —

There are then very few contracts of Infants which are strictly void. The indefinite class mentioned, which must be very small, are such as a power of Attorney & the case mentioned from 3 of Keble —

3 Burr 1104-6.

2 Str 603. Str 938.

2 H. Bl. 511. Fentl 74

8 Co. 42. Bow Com. 38

1 Mod 25 —

Carth. 436 —

If a contract is void, third persons or the adversary party may take advantage of it; but if it is merely voidable, only the party for whose benefit it is made, & his representatives can take advantage of it.

as if an Infant sells a house, & delivers it, no one can treat it other than as a binding contract, but the Infant or his Representatives. But if he had not delivered it, the adversary party, & strangers may consider it void & Execution &c &c

Parent and Child

Lecture 6th

I observed in the last Lecture that voidable contracts could be taken advantage of only by off-
himself or his representatives; & according to this principle it is a rule, that if a voidable

8 Co. 42. 43 -

1 Inst. 337 -

1 Roll. 755 -

3 Bar. 142 -

Conveyance of Real estate is made by an Infant, only he himself during his life, & his "privies in blood," i.e. "his Heirs" can take advantage of it - His "privies in blood," as Remainder men & Reversioners, cannot take advantage of it & come into possession. They hold an aliquot part with the Tenant in Tail - The representatives of an Infant are those spoken of as the representatives of his Infancy -

2 Bulst. 69 -

Fonbl. 131. 132

5 Bar. 534. 1 Inst. 3^a -

Co. fac. 320. 2 Vent. 203.

St. 620. Roll. 51

Another distinction between void & voidable contracts is that the former cannot be confirmed, but the latter can be either by express, or implied confirmation, as well if Lessor as Lessee. In general any act after full age evincing an intention to waive the privilege of Infancy, amounts to an implied confirmation.

2 J.R. 766

3 Co. 64^b H.R. 75

Doug. 53

Camp. 201. 482.

Atk 354. 7 J.R. 83

as if a lease is made by an Infant & now if he continues in possession after full age he thus ratifies his contract, & is liable for the whole rent that has accrued during his minority & after it, for the contract takes effect *ab initio*."

This case of Lease is only an example of an implied confirmation. A void contract it has been observed cannot be confirmed - as if an Infant takes a new lease of the same ten on the same terms not increasing the rent, or diminishing the term; he can never ratify or confirm it, for it is absolutely void.

Thus far of the distinction between void & voidable contracts. We come now to speak of the time & manner, in which an Infant may avoid his voidable contracts. If an Infant has conveyed his estate by fine or common recovery - he may avoid this conveyance, by a writ of Error during his infancy, but not after & the reason is, that during his minority, his age is determined, by inspection & there is nothing against the record. But after he attains full age his age is to be determined by a Jury, & nothing shall be averred which is contrary to the record.

1 Inst. 380. 12 Co. 122

3 mod. 229. or 2nd

197. 243. Penn. 214.

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This is the rule as to judicial conveyances.
 But there is a material difference between this
 & a conveyance by matter in pais, i. e. by his
 own act. This it has been said he may avoid
 either before or after full age. But this seems

not to be Law for it is now settled that he cannot
 avoid it until of full age; because an avoidance
 before this period is as voidable as the first con-
 veyance, & therefore he might avoid the avoiding act.

It follows from this that if an Infant, before
 full age, makes a re-entry to avoid his conveyance,
 a stranger cannot enter upon the Land or the
 property of the Infant, either by virtue of a feoff-
 ment made by the Infant, or by virtue of an

Execution levied upon it; in Li' Pavan - the
 reason is, the stranger has no right only under the
 voidable act of re-entry, & the Feoffee's title is the
 older one. The rule is the same as to other convey-
 -ances by matter in pais as Lease & release -

2. I. R. 161 - So that the meaning of Buller's rule must be, that
 it is binding only during Infancy. It is here
 necessary to observe that there are some exempt Cases
 in Equity on this subject that fall under no title of the Law.

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Marriage settlement agreements made by Infants with consent of Parents or Guardians, are for the most part binding in Equity; & for this reason, because they are only necessary to the primary or principal contract which is the marriage - by agreement, is meant an agreement to settle property upon one, or both, or Issue. This is not allowed at Common Law & is very little known in this Country, because the property of the Ancestors goes to the children generally. But in England where the Eldest is heir to the whole, it is necessary that these marriage settlement agreements should be made, in order to provide for the younger children. The reason why Chancery can make them binding, is because this Court is the Guardian & sole the infants in the Kingdom. This is true a branch of the royal prerogative delegated to the Chancellor & consequently Courts of Law cannot restrain his power in this respect. He is the paramount Guardian of all Infants & by virtue of this power, such contracts are enforced in Chancery. Now for such contracts made by Infants are to be enforced by Chancery is not settled. There is then no general rule on this subject tho it is said to be one, that the Court of Chancery will generally enforce such contracts. Their power is discretionary. That is, legal discretion.

1 Pow. Com. 42 -
3 Atk. 56 -
Mrs. Chanc. 152 -

Parent & Child

3 Atk 613-

2 Vern. 507-

10 Wms 574-

Pawson 146

Darnley 117-

9 Mod. 101-

5 Br. P.C. 570-

2 Eq. Cab. 102-

1 Ves. 55-

Pawson 53-

1 Montb. 68 & 70

2 Chan. Cas. 211-

Pawson 52-

St. 604

20 Wms 229-

of this is to be found in former precedents & usages of the Court. It has however been settled that the intent of a female Infant in a money portion shall be barred by a marriage settlement agreement before marriage -

It is well settled that a female Infant may bar her right of Dower, by accepting under such an agreement, a settlement by way of Jointure - A Jointure is a Substitute for Dower. and it has been held that she is bound by it, tho' it consists of personal property; which is contrary to the common Law principle of Jointure, that it must consist of real estate - It is said in some of the Books, ^{tho' there is} doubt, if a male Infant can bind his real estate, by such a marriage settlement. I see no difference between male & female infants as to their power in this respect - If it is good in one, it is, or should be so, in the other.

Besides, it is settled that a male Infant's lease for lives with consent of Parents (which is a Freehold) having been settled for uses, binds him -

So that Donblanquer is incorrect - for this is Real Estate -

Parent and Child

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20th Nov 243-

Par. 48-

30th 613-15-

1 Par. 50-

1 Dec 61. Ca. 116-

It has been advised by Lord Hardwicke, that if a female Infant entered in her, covenants a marriage with Consent of Guardian, in consideration of marriage to convey this estate over to her husband Chancery will compel the performance of the contract. So I conceive a male Infant may - Lord Hardwicke, in speaking of this case, says, 'this is going a great way' - yet, he says, there are cases, where Chancery will do it when the settlement made by the husband is an adequate one to the Land - again; It is said by Lord Thurlow, that, the real estate of the female Infant is not bound by a contract to convey it to the husband, unless after the death of her husband she takes possession of the settlement yet he says, the Court, never ought to go into the enquiry whether the marriage settlement be an adequate one or not, for her real estate. This is directly opposed to the opinion of Lord Hardwicke - & upon the whole, I doubt whether it will bind her unless she afterwards ratifies it -

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3 Bro. P. C. 514

3 Atk. 36

1 Honbl. 70

One point however is clear that a contract made by a female Infant, to convey her real estate, will not bind her, unless it be made before marriage takes place, because by marriage she acquires an additional incapacity, & is supposed to be under coercion.

2 Bro. Ch. 545.

1 Honbl. 70

But the general question whether a male Infant may bind his real estate by such an agreement is not settled. Tho it is settled, that if he covenants with a female adult, to convey her estate to uses, in contemplation of marriage, he is bound by it, & thereby waiving his contingent right of bastardy.

20 W. 244

1 Honbl. 69. 70

3 Atk. 615. Pow.
Com. 47. 52. Bro. Ch. 1

115. 116. 152

And according to the current of authorities it seems also settled, that no marriage settlement made by an Infant, male or female, to settle real estate, will be enforced in Chancery unless it is fair & reasonable & upon an adequate consideration. — From all the investigation I have been able to give this subject, I find no settled principles laid down which govern the cases —

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Another rule, peculiar to the Law of Equity, is that if an Infant capable of making a will of personal property, does bequeath his personal property for the payment of his Debts his Executor will be compelled in Equity to pay them: these Debts are those to which by Law he is not bound to pay — This is a rule founded in strict principle — By Law, he may make a will of personal property. By Chancery he can make a bequest now in pursuance of this power, can he not order his Executor to pay this bequest to his creditor? Clearly so — Why then cannot he order his Executor to pay his Debts out of his personal property? It is not a ratification of the Debt, & the Creditor may receive as a Legatee. The contract is only evidence of what sum shall be paid —

I have before observed that Infants contracts may be ratified at Law after full age. In Chancery a contract made by another with or without Infants consent may be ratified by the Infant after full age by express or implied approbation of it — as where land belonging to six children, was leased by their mother during their infancy for 40 years — they continued to receive the rent some time after full age, & then brought their Bill in Chancery to avoid the lease — but it was dismissed: & that justly according to Law & Equity

1 Cas. Abr. 282

1 Wood 403~

Howell 74.

Equ. Com. 47~

1 Atk. 159~

Parent and Child

Lecture 7th Oct. 6th 1869

What power an Infant may execute

"Power" as used in Law, is an authority conferred by one person upon another, in relation to some right or interest of him upon whom the power is given as an attorney whose power is given by his client. Or as the case may be, by the father to an individual.

But with regard to Infants, it is a general rule, that they cannot execute general power over real estate. By general is meant a discretionary power - & the reason plainly is, that

he has no discretion. But a naked or special power, that is, when the manner of doing it, is pointed out in the power, may be executed by an

Infant, because no discretion is necessary, or his interest in any manner affected, nor is there any danger of injuring the interest of any other. He acts as a mere instrument - like a mere mechanical act that he has to perform - He is, or so to speak, of - hence it, a mere conduit pipe, thro' which the authority runs. as a power to sign a particular instrument

But an Infant cannot execute a discretionary power over his inheritance, because ~~that~~ may be to his disadvantage. It is therefore void.

1 Ves 298. 304

3 Atk. 695

Pow. Pow. 43. 48

3 Atk 710. 714

Pow. Pow. 47

Pow. Pow. 43

1 Ves 306

1 Ves 304. 6

Pow. Pow. 43.

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Thus suppose S. devises an estate to an Infant for life, & gives him power to make an estate for three lives. Now this power he cannot execute because he might destroy his own freehold -

3ath. 710 -

Athens says that Lord Hardwicke gave it as his opinion, that there is no precedent, either in Law or in Equity that a power over real estate may be executed by an Infant. By this is, & can be meant nothing more than that there is no instance of a general authority to, & so it is said, as reported by Vesey, who is a more correct Reporter than Athyrs - It is seen that an Infant may execute a discretionary power over personal estate even tho his own interest is affected by it - provided he is old enough to bequeath it by will & the reason is, that he has then acquired sufficient discretion in the eye of the Law to have the charge of his personal property - There is difference between real & personal estate - Where an Infant living tenant for life, with power to make a jointure, in pursuance of this power, covenanted to make a settlement upon his wife, this covenant was enforced in Equity. In this case his Interest was not affected by it, altho the power is over real estate

Vesey 304 -

1 Ves. 303 -

Par. Case 54 -

Str. 604 -

20 Wm 229 -

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For the jointure is not to take effect until after his death, & the moment he ceases to be, his estate ceases, because he is only tenant for life.

The result of all these rules & distinctions is, 1st That an Infant not interested in the execution of a power, may execute it, so as to bind the principal to the extent of it, provided it does not amount to a discretionary power over real estate - and 2^d Tho he is interested, he may execute a general or discretionary power over personal estate, provided he is of sufficient age to bequeath personal property by will -

There are certain offices which an Infant may hold, & certain distinctions respecting them require to be noticed.

It is a general rule that an Infant may hold a ministerial office, requiring only skill & diligence in the execution of its duties; But he can hold no office requiring discretion. Hence he can never hold a judicial office. He may be a Bailiff, Steward, or Factor; but never a Judge within of a Court of record or not.

The reason why he may hold a ministerial office is said to be, because if he cannot execute it himself his deputy may. These offices are considered as judicial.

Bro. Elor. 636-7-

1 Inst 3⁶

Com. D. title officer-

3 Bar 725. 736-

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The books do not tell us how his Deputy is appointed, for surely he cannot appoint him. I suppose he is appointed by his Guardian or by the Chancellor. Suppose then an office is given to A's heirs. A dies & leaves a son 3 years old. This son to may hold it, altho he cannot execute it & his Deputy may - Now the only difficulty is, how shall this deputy be appointed. He certainly must derive his authority from the Dift. He must be appointed either by the Chancellor or his Guardian.

The true criterion then as it respects those offices which an Dift. may & those which he may not hold is this - If the office can be executed by a Deputy he may hold it. If it can not be thus executed, he cannot hold it, altho the office is a ministerial one -

3 Bae 126 note -

But an Dift. cannot be an Attorney for want of discretion, the Law will not allow ^{him} to take the oath

3 Bae 126. Note 325

Now can an Dift. in any case be a Tutor for two reasons, first, because he has not discretion secondly, because a Tutor acts judicially -

An Dift. may be ex at any age & at 14 exercise it - an executorship is an office. Suppose then one of tender years is appointed. His deputy may execute it, appointed by the Chancellor or ordinary as the case may be. He is an "administrator durante minore etate cum testamentis annexis" & acts for & in behalf of the Dift. Ex -

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So far as an Inf. may hold & execute his office, & does hold & execute it, his privilege is destroyed; or in other words an Inf. acting as an officer is bound by his official acts; because it would be in the highest degree unjust were he not - He acts under the authority of Law & if under colour of it, does an injury, the Law surely will make him responsible for it - Hence, if an Inf. being a Sailor suffer an escape R. is responsible -

How far an Inf. is affected by the non-performance of conditions annexed to his office or estate.

1 Brk. 246⁴

2 Wm. 580. 323.

8 Geo. 44.

Coast. 43.

1 Kent. 199.

These conditions are of two sorts, express & implied.

It is a gen^l rule that Inf. are bound by express condition as much as adults, tho it is not universally true - Hence if an Inf. holds an estate to which an express condition is annexed imposing a forfeiture upon the event of a certain thing, he forfeits the estate by a non-performance of the condition as much as if he were an adult -

This rule indeed is founded upon the idea that he who grants an estate to another has a right to order that estate to come back to him unless the conditions are performed - The estate goes out of his hands on the ~~express~~ condition that such things be or be not done - But there is an exception in the case of an Inf. where the condition is to be performed & on failure a penalty is forfeited. Here the Inf. is not bound by this penalty -

1 Brk. 246⁴

1 Kent. 200.

Coast. 43.

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Where nothing is forfeited but the estate he is then bound
 But where something collateral is forfeited the Trst.
 is not bound by it, because this might be made a use
 of for the purpose of swindling the Trst to an indefinite
 extent - & consequently his privileges given by Law would
 be endangered -

as to implied conditions - They may
 be created either at com Law or by Stat.
 according to La. Both implied conditions at
 com Law are either founded on skill & confidence
 or not so founded, i.e. they are founded on a
 presumption of skill or fidelity, or upon some
 consideration different from them.

By implied conditions at com Law, trades
 on skill & fidelity in the person to be bound. Trsts
 are bound as well as them.

It is a condition annexed by com Law, to
 all office that the holder shall conduct skilfully
 & faithfully. If then an Trst being a steward
 conducts unfaithfully or unskilfully, he forfeits
 this office by virtue of the condition implied
 by the com Law -

But by such conditions implied by
 com Law as are not founded upon any
 supposed skill or fidelity, or growing out of
 any special confidence in the Trst. he is not bound.

1 Inst. 230^c
 1 Fowl 682-3.
 8 Co. 44^c
 Geo. Cas. 556.

8 Co. 44^c
 1 Roll 851.
 1 Inst. 233^c

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Now it is a rule of the Com Law. that if a Leasee for life alienes his estate in fee, he forfeits his life estate - this is a branch of the Feudal system & somewhat arbitrary - the reasons for it not now existing - If an Infant being such a Leasee alienes in fee he does not forfeit his estate: an Adult would

As to conditions implied by Stat. Law, a distinction is taken which I do not well understand.

The rule is this - Where the Stat imposing the condition gives a recovery ag^t the Leasee for the breach or nonperformance of a condition, Infants are bound by the implied conditions - because here it only gives an entry -

Plowd 384
1 Inst 54^a
5 Bac 474.
8 Geo. 44^b

Thus if an Infant being a Leasee for life or years, commits waste, he forfeits his estate because the Stat of Gloucester gives a recovery ag^t him -

8 Geo 44^b 1 Inst 233^b
1 Doncl. 82-3.

But where the Stat Law gives only an entry for the nonperformance or breach of the conditions & no recovery, the Infant is not bound by the condition - as if an Infant alienes in mortmain, he does not forfeit his estate - the Adult would - I can see no very clear reason for this distinction - the perhaps it is this - Where

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The Stat. expressly gives a recovery as^t the
 Trust. It expressly takes away his privilege
 But where it only gives a right of entry
 it does not expressly take away his privilege
 & it is a gen^l rule of Law that the privilege
 of an Trust shall not be taken away by
 mere implication.

It is a gen^l rule that Trusts are bound
 by the Stat^s of Limitations unless their rights
 are saved by a proviso. Stat^s of Limitations
 are in the nature of conditions annexed
 to a right. Now in this case the Trust
 is bound because there is an express con-
 dition annexed by Stat., which takes away
 his privilege, unless complied^{with}. For this
 reason the Stat^s generally contain a clause
 in favour of Infants. — Perhaps it is
 the case in all the Statutes of Limitations
 that have been passed —

Yet it is a rule that if an ex^{ec}, adm^{or} or
 trustee for an Trust does not sue
 upon the Trust contract, or enforce
 his rights within the time prescribed
 by the Stat. of Limitations, the saving exception
 notwithstanding, the Trust is barred: & this obtains in eq^l & at Law.

1 Lev. 31.
 22. H. 518.
 3 Bosc. 513.

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Thus an actⁿ on a note of hand in Leon must be br^d within 17 years - Now a note is given to A in trust for an Inf^t. Under the trustee brings the actⁿ within 17 yrs. a recovery upon it is forever gone - This rule relates to Ex^{ts} (Adm^{rs} or Trustees who have a right to sue in their own names. It does not extend to such cases where the action is to be br^d by the Inf^t in his own name. -

30th 1st 309.

Thus suppose a Legacy is given to our Inf^t. The actⁿ to recover this must be br^d in his own name & the Stat. does not run ag^t him

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Lecture 8th

Thus far we have spoken of a lot rights an Infant may acquire & a lot duties he has to perform - we come now to speak of the means of asserting those rights & enforcing those duties: & first,

How Infants are to sue & be sued

When an action is to be brought by an Infant he must always appear by his Guardian, or next friend - He can never appear by attorney because he cannot appoint one & because he cannot execute a power of Attorney.

3 Pl. 300. 2 Rolt
287. 1 Inst. 135.th
Ga. 123 -
If then an Infant Plaintiff appears without Guardian or next friend any. The Defendant may plead to his disability - It is necessary then for that he avers in his writ that he sues by his Guardian or next friend -

At Common Law indeed, an Infant could sue in no other way than by Guardian, no provision was made for his appearing by next friend - But by the Statute Westminster 1st Infants were allowed to sue by next friend in a Court of Common Law in certain particular cases of necessity. The right then of appearing by next friend was derived from the provisions of these statutes.

6 Co. Jan. 640 -

Palmer 295 -

Str. 709 -

2 Bac. 680 -

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These cases of necessity, in which the two Statutes allow the Infant to appear by next friend may be reduced to four: 1st When he sues his guardian - Here clearly there is necessity - 2nd When the suit is against a stranger, & the guardian will not appear himself, but consents to the action, here he may sue by next friend. If the Guardian does not consent to the bringing the suit, it cannot be brought. 3rd When he has no Guardian - Here unless he may sue otherwise than by guardian, his rights that are infringed & his wrongs would be unredressed. 4th Where the he has a guardian, yet he is eluded from him, & cannot appear in his behalf - Infant may sue by next friend: as where Guardian is in England & Infant in the U. States - But according to some old opinions, the Infant under the equity of the statutes mentioned, may appear by next friend in any case. If this were true, the right of the guardian over the Infants suits, would be entirely destroyed - The guardian has a control over the person & property of the Infant, & if the Infant might sue by next friend in any case, his property might be wholly squandered away -

Cro. Jac. 640 -
 Hutt. 92 -
 Palm 295 -
 Hils 369 -
 1 Inst. 135th note
 2. Bar. 680 -
 3 de. 149 -
 1 Inst. 135th text -
 2 as 396. 261 -
 Cro. Car. 86 -
 Hutt. 92

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2 L. R. 203-

If an action is brought by husband & wife, the living infant need not appear by guardian. For the husband has a right to appoint an attorney, for himself & wife both. In fact the husband is the guardian for the wife, for most purposes. So that it has once been said that the guardianship of the wife ceases upon marriage. This is not wholly true. —

Str. 506-

Eq. Ca. 72-

Str. 1026-

Wils. 130-

Ord. Law Court-

224-

When an Infant sues by his guardian or next friend, either of them who appears, is answerable for the costs immediately, & is compelled to give security for them. The reason for this is, the guardian or next friend may bring very improvident suits to the detriment of the Infant's estate, if they were not compellable to pay the costs. Now this rule means that guardian or next friend are liable in the first instance. but not on the Execution against the Infant. For if the guardian has conducted honestly & fairly, the Court will allow him a reimbursement out of the estate of the ward. According to some opinions, the Infant is liable in the first instance if the Defendant at his election may proceed against him or guardian. This is now denied to be Law. And the true rule is, as laid down by Lord Chancellor King, that there is no instance in Law or Equity in which an Infant Plaintiff has been

2 P. W. 298-

Gill. L. C. 87-

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In Connecticut the practice is different & the Court never enquire of course into the qualifications of the Guardian tho they undoubtedly have a right so to do. If complaint should be made that the guardian cannot safely take the management of the suit, the Court would enquire into the care of the Infants interest - they have been established in rule, that the next friends shall always be admitted & record by the Court. But not so with the guardian. A suit of next friends is said by these Courts to be sufficient & the W^g thinks it ought not to be. For now any person may sue for the Infant even without his consent as he is supposed to have no discretion - true he may be dismissed by the Court, & that he does it at his peril so far as it respects the costs.

If an Infant & adult sue Co-executors in an action brought by them jointly in that character the Infant may appear by Attorney appointed by the adult for as their rights are joint ones, the adult may appoint for himself his Attorney & appointed will be the Infants Attorney - it being a general principle that where two have a joint right, the act of one respecting it, shall bind the other - the interest & the interest of third person - But when they are sued, it is not so - Here the Infant must appear by Guardian for then it is their joint right, it may be they are with co-executors. In suing as co-executors they cannot deny that they are such - but when they are sued it may be denied. It has been said that if an Infant Executor sue alone, he may sue by Attorney the next administrator I can see no difference. It is not Law. Lord Holt too denies it -

9 Bac. 680. 1 Bl 464
1 Bg. Ca. abn. 72

3 Bac 149. 151 -
Cro Eliz. 298. 541 -

2 Saund 212-3.
1 Vent. 102. 2 Poff

232. 600. 1449.

At. 784 -

Carth. 102. 2. 213 -
Cro Jac 420. 441 -

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Lecture 9th 27.2.22 - Feb. 11 -

How an Infant may be sued

Here it is to be observed that an Infant Defendant must always appear by guardian & never by next friend. For by the Common Law no Infant could be sued and appear by next friend, & the Statute of Westminster I 127 confines the right of appearing by next friend to Infants Plaintiffs, how & here he is sued his pleadings must be signed by his Guardian, & and it seems to be agreed that in an action against husband & wife, the being an Infant, the must appear by guardian & not by attorney - for this distinction I see no reason between an Infant from Court when Plaintiff & when Defendant.

If the Infant has no guardian, the Court will appoint one pro re nata. This guardian is called a guardian ad litem. If he has a guardian he must be called - tho if he does not appear, the Court may appoint another pro hac vice. This is doubtful - tho I think the safest way of proceeding - but clearly if the Infant has a guardian who, out of the reach of process, or has misdeemeaned himself, the Court may then appoint another - a Court cannot of strict right remove a guardian who brings a particular suit & appoint another. For if they could in any case

5 Co. 53. -

1 Inst 89 -

135th L. Lev.

136. 3 M. 427.

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1 Liel. 424. appoint a Guardian ad litem they might
 Stiles 456- remove the true one appointed by Law, & would
 3 Prae. 150 note assume a power never delegated to them.

It is to be remarked that the power to appoint a Guardian ad litem is incidental to every Court before which an Infant may be sued.

As an Infant Defendant is to appear regularly by guardian, the guardian ought to be summoned & notified to appear & defend for the Infant. But the process against the Infant does not abate, because the Guardian was not summoned. For after process returned he may be notified.

Bro Jac 645- If an Infant Defendant appears by Attorney
 Gylv. 58 Carth. & judgement goes against him, it may be reversed
 367. 1 Co. 53- by a writ of Error, brought before the same Court
 2 Lev. 126- who rendered the judgement. it is called a writ of Error "coram vobis". In England it is not always brought before the same Court, & it is an error in fact & not in the pleadings.

In Connecticut, if an Infant being sued does not appear at all & judgement goes against him by default. Still it is erroneous if the guardian was not summoned. If notified, it is sufficient for the Court have done all they could do. They cannot compel the guardian to appear. This will hardly apply in England, for judgement is never rendered there unless there is an actual, constructive or fictitious appearance.

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Dec. Jan. 441. 580
 1 Nov 93 -
 2 do 198 -
 If an Infant & Co. left fails to appear & judgment
 goes against him, it is error. But by statute
 of the 1st it is enacted that if an Infant & Co. fail to
 appear by attorney & judgment goes for him
 after verdict, or on a verdict entered in his
 favour, it is not error. This seems to imply that
 where judgment is not on verdict, it is error.

If this were ancient statute I think it would be so now.

Dec. Jan 289 -
 Roll 466. Hild.
 706. Barth 207.
 3 Feb. 435 -
 If an Infant being sued with others, who
 are adults, appears by attorney, & enters damages
 given against them all, according to the English prac-
 tice, it is erroneous as to all. Thus suppose a
 an Infant & 100 adults are sued together in an
 action of trespass & judgment is given against
 both, & entire damages. This judgment is may be
 reversed in toto. But in this case if the jury

5 Co. 58. the 189. 808
 14 Dec 2022 -
 Have assessed damages severally i.e. so much against
 one, & so much against the other, it would be
 erroneous only as it regarded that of the Infant -
 Execution might issue against the adult. For
 here the case is the same, as if there had been
 two distinct judgements: there is but one

Trinity 115

In Supreme Court in Connecticut it has been
 decided that when Infant & adult are sued together
 as trespassers, & the Infant appears by attorney

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& the Jury assess damages against an infant -
-ment is erroneous only as it respects the Infant
is in good against the adult, & damages may be
recovered out of the adult. This perhaps is reasonable
for the adult might have been sued alone
for the trespass, & whole damages recovered. This
since it is a rule, that if two are jointly concerned
in a trespass, the act of one is the act of the other
& as the Plaintiff has his election to sue one or
both, the adult cannot complain - for if the
judgement had been a good one against the Infant
the Plaintiff might have recovered it all out of the adult
who would not have been able to procure a con-
tribution from the Infant because between
two persons there is no contribution. This
however is opposed to the common Law rule, & I
doubt therefore if it be Law -

If an Infant & an Adult join in conveying
a piece, it may be reviewed as a matter of course
as it respects the Infant during his minority -
But it remains good against the adult for, first
their interests are distinct, & secondly, this fine
is a species of Common assurance & is in the nature
of a Deed of record & therefore a contract but it is
a rule of Law, that if an Infant & adult join
in a contract, which is not obligatory upon the
Infant, the adult is bound by it, tho the Infant is not.

2 Bou 229 -

Holt 248 -

1 Cro Eliz 115. 124

2 Leon. 108 -

Parent and Child

How the Law regards Infants ^{in utero sa men?}

1 M. 120 -

4 M. 198 -

1 Hawk 131

An unborn Infant as to many respects is considered by Law as in esse, which they were not formerly. The Law in modern times has undergone a considerable change. The killing an unborn Infant is not Homicide, but it is a great mischief. For as to this it is not considered in esse strictly, - The Law as it respects this, is as it formerly was. By mischief is meant any high offence, under the degree of Felony -

1 M. 197-8

3 Inst 50 -

1 Hawk 121 -

But if an unborn infant having received a mortal wound or injury, is born alive, ^{after the cause} within a year & a day, dies in consequence of the wound or injury, it is Homicide. The time here limited extends to all cases of Homicide whatever. It may be murder & in the books it is said it is murder, though this is meant only that it may be. The true rule is, it is Homicide; but if the wound was given with malice prepetra it is murder, if attended with great provocation so as to reduce it to man-slaughter it is then that offence & so it may be excusable or justifiable Homicide.

1 Hall B. 433.

It has been laid down that it cannot be murder but this is now denied to be Law.

Parent and Child

2 M. 208-10 Wm
486-7. Day 481
note. 5 T. R. 60-
Hob. 3-
An unborn Infant is in Esse for the purpose
of inheriting. He may inherit his ancestor's Es-
tate. But the intervening time between the death
of the ancestor & the birth of the Infant, the Heir
Presumptive succeeds to the inheritance.

Here, he will be an Heir of course —
As the Law now is, he may take by devise;
formerly it was not so. Within two centuries past
there have been some very subtle distinctions between
those per verba de presenti & those per verba
de futuro. To the former of which, it was said, the
unborn Infant could not be a devisee, to the
latter he could. But these distinctions I conceive
are now entirely exploded. This is always an
Expectant Devise, & his devise not being contrary
to the rules of Law should be followed. The unborn
Infant then may be a Devisee of real, or a
Legatee of personal estate.

In the case of an unborn Infant who is
a Devisee, between the time of the death of the
Devisor & the birth of the Infant, the property goes
to the Heir & not to the Heir Presumptive.

2 M. 446-
2 Atk. 117- Baird 296.
An unborn Infant may take a distribution
share under the statute of Distributions

Parent and Child.

Rev. Ch. 50-

2 Wm. 399-

Ex. or 246

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Under a term created for the purpose of raising portions for such children as a shall have living at the time of his death, a posthumous child shall take equally with the others. In any a person wishing to oblige his heirs at Law to provide for his other children or suitable support, he will leave away his property to A B & C for 30 years in trust, for the purpose of creating these portions; the heir at Law in order to obtain this property, must raise these portions.

Is also if a bond is given to a person

2 Termen 283-

Conditional, that he shall pay a certain sum to such children as he should have living, at his death. A posthumous child will take under it equal to the other children.

Rev. Chan. 50-

2 Vern. 710-

2 Atk 117-

An unborn Infant, as it respects waste is considered in esse; for an injunction to stay waste may be granted in his favour, & the Bill for this purpose may be brought in Chancery by any person styling himself next friend-

1 M. 120. 462. 466.

It is also settled that under the Statute Cap. 2 an unborn Infant may have a testamentary guardian appointed for him, which guardianship takes effect immediately on his birth: it also provides that a father may appoint guardians for his children alive.

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West. 307. 560.

2d. 3 Bac. 123.

An unborn Infant may be appointed an Executor at any age; but cannot act as such until 17 - An Administrator durante minoritate must be appointed; & if a Testator appoints an unborn Infant his executor & two are born, they are Co-executors, for neither can claim Priority - So if one devises an estate or bequeaths

at supra -

a legacy to the unborn child of a & two are born, they both take jointly -

Lecture 10th

Relative rights & duties of Parents & Children -

This leads to the consideration of those Children that are legitimate & those that are illegitimate; & first of Legitimate Children - a legitimate

1 Bl. 446 -

1 Inst. 244 -

Bro. Jac. 541 -

child, is defined to be one who is born in lawful wedlock, or within a competent time afterwards. The amount of this definition is, that a legitimate child is one begotten or born during lawful wedlock.

H. 940. -

560 98th -

By this definition is not meant every child who is ^{born} begotten during wedlock or a competent time afterwards, is of course legitimate, but that no one can be legitimate unless born under these circumstances

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Edw 483

1 Bl. 457-

If so born, he is prima facie legitimate - that is, the presumption of Law is very strong in his favour - & the onus probandi lies on the opposite party -

1 Bl. 454 -

An illegitimate child, is defined to be one begotten & born out of lawful wedlock - This I think incorrect, for if a child is begotten before the parties intermarry, & is born after the death of the father, there having been a previous intermarriage, the child is legitimate - yet he is within the rule - I should define an illegitimate child to be one who is begotten ^{lawful} out of wedlock, & not born either during wedlock or a competent time afterwards.

56. 98^c -

2 H. 940-

Falk 123 -

1 Bl. 457 -

A Child born under the first mentioned circumstances, is presumed to be legitimate and formerly no proof, except what rendered legitimacy impossible was admitted: & this could be done only two ways; 1st by proving want of access - 2^d by shewing the husband's incontinency: No proof of these being a strong probability of illegitimacy was permitted. As the rule formerly stood no other proof of the non access of the husband was permitted than his absence extra quatuor maria,

1 Inst 244 Roll 358

Falk 122 Bath 122

- L.R. 395. - From the whole time of the conception to
 1 Bac. 310-11 - the time of the birth. For if the husband
 was absent for any length of time beyond
 seas, & she had a child any time after his
 return, tho it was the next day, it would be
 legitimate & no proof to the contrary could be
 admitted - So if it could be proved that the
 husband had been confined within the
 realm for 20 years, & had seen no other
 persons but his keepers, yet the child would
 be legitimate & no proof to the contrary could
 be admitted -
- Salk. 122 -
 484 -
 Rolle. 358 -
 1 Inst. 244 -
- 1 Bl. 457. 1 Bac. 310. = (as to the mode of proving impotency, vide
 authorities in the margin)
- These rules however have been very much
 relaxed - Indeed they may be considered as abolished.
- 3 P.Wm. 275-6 -
 5 Mod. 214. 2 Str -
 925. Col. 484 -
- For, first, non access may be proved in other
 ways than by absence beyond seas. The jury, who
 are the judges of the fact, may now find access
 or not, if the husband has been all the time in
 the realm - Real non access is all that is necessary.
- Impotency may be proved in other ways
 than formerly - the cases cited in the
 margin, point out the former & present manner

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4 T.R. 356-
Esp. 1484-
Cowp. 494-

The ancient rules are not only relaxed in this respect but it is now settled that other evidence, than those of non-access & impotency may be admitted to prove the illegitimacy of a child, altho born in lawful wedlock - as if the mother has cohabited with a stranger, if the child is reputed to be illegitimate, if it has gone by the name of the stranger &c. - Now there do not go to the impossibility, but to the improbability of the legitimacy - The fact is still to be proved in the same manner as any other fact.

The issue of a marriage which is null, ab initio, is of course illegitimate. In Blackstone under the head of husband & wife you will find what marriages are null & void - The reason is there is no relation of husband & wife. Their connexion is meretricious & consequently their issue illegitimate.

1 Bl. 1356. 440
1, 56. Brok 235
760. 41-

So when a total Divorce has been granted, for causes existing before the marriage, ^{there are 2 classes, in which one null & void} this divorce renders the issue illegitimate, those which are made so by civil impediments, & those by canonical impediments: In the former a divorce is not necessary to prove the issue illegitimate, in the latter it is.

1 M. 449.

Civil disabilities render a marriage void,
canonical only voidable. But it is to be
observed that the legality of a marriage not
absolutely void can never be called in question, ex-
cept within the lives of either of the parties. This is
the case with those marriages which are made void
by reason of some canonical impediment; & the
reason is that divorces are granted & marriages an-
nulled in the spiritual courts, for the good of
the parties, which cannot be done when one of them
is dead. This rule is confined to those marriages which
are unlawful by reason of some canonical impediment
that is, where divorces are necessary to prove the
illegitimacy - which are necessary only in cases of
canonical impediments. For civil disabilities,
legitimacy may be denied at any time.

If a child is begotten & born after a divorce
"a mensa et thoro" the presumption is that it
is illegitimate, because the Law presumes the
parties to have conformed to the divorce, which
was to live separate & which prohibits their living
together & cohabiting again.

Balk 123
7. Co. 42

But where there is a voluntary separation
by agreement of the parties to live separate, or

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article, of separation, if a child is born, it is presumed to be legitimate, because the Law raises no presumption of this conformity, & their own voluntary agreement. Yet the presumption in both cases may be rebutted.

When the question of legitimacy depends upon that of access, the wife is not a competent witness to prove non-access. It is, says Lord Mansfield against the policy of the Law, because it might give offence to the Husband, & it is also contra bonos mores. Yet she is a good witness to prove her own incontinence, tho' it would seem equally contra bonos mores, for there is a supposed necessity, as she may be the only person acquainted with the fact.

The parties are both competent witnesses, to prove the time of the child's birth, & the question of legitimacy may often depend upon that fact. So they are both competent witnesses to prove the time & fact of marriage.

So also the declaration of either party out of Court respecting the birth of the child before marriage, may be proved after their deaths.

Coop. 594-

Bull. N.P. 112-

1 Wood " 342-

Coop. 594-

Upon questions of Birth, death, marriage & pedigree, Hearsay Evidence is generally admitted. So also, Tradition, Common reputation, Family registers, inscriptions on tomb stones &c. may be admitted.

So also, If to a Wife in Chancery, Husband or wife in a suit against third persons, have in any way stated the fact, that the Child was born before marriage, or any other fact vouching its illegitimacy, it is good evidence of illegitimacy after the death of the Parents.

By the Roman Law & Canon Law, a Child born before marriage is legitimated by the intermarriage of the parties. But by the Common Law, (and that prevails here) if the parents intermarry after the birth of the child, it is illegitimate - but if they intermarry any time before the birth, tho' put on record, it is legitimate.

(And it is a rule that all children born of a widow so long after the husband's death, that by the usual course of gestation they cannot be his, they are illegitimate - that this usual time is, in order to determine prima facie the legitimacy or illegitimacy of a child, is not precisely ascertained. This a question for the Medical Faculty

Parents Child.

Co. Litt. 123
notes 122 -

rather than for Lawyers - There are however
some rules laid down - It seems to be agreed,
that the usual time is 9 solar months - this time
may be shortened or prolonged by circumstances
which may be given in evidence.

Palm 3 Inst. 8.

1 Bac. 312 -
1 Bl. 486. Co. Litt.
541. Bull. N. S. 114

It is said, if the child is born within the
usual time of gestation, it is prima facie legit-
imate - If born after the expiration of the usual
time it is prima facie evidence of illegitimacy -

1 Bl. 486 -

1 Inst. 8 -

It is said, if a woman marries immediately
after the death of her husband, & has a child within
such a time, that it may possibly be the child
of either, when it arrives at years of discretion,
he may choose which he pleases for his father.
But if there is satisfactory evidence to shew
to which he belongs that would determine it.

Talk 120 -

3 Lev. 410 -

I observed under what circumstances children
are rendered illegitimate. This rule holds only
between marital union & bastard's sign. It is not
the case, of bastardizing issue by divorce or impeaching
a valid marriage. He is a bastard because he
has not been in matrimony. The rule is this: If
the eldest son (i.e. the illegitimate) enters upon
his father's estate & dies seized, his issue shall hold
to the exclusion of the others. But there must have

1 Inst. 244

1 Bac 316

1 Roll 624

3 Lev. 410

has an uninterrupted possession & a descent cast upon his issue, & if the eldest son be the one before marriage & leaves no issue alive, at the time of his death, the youngest child, viz the one born after marriage shall inherit.

Lecture IIth

As to the rights & incapacities of illegitimates.

1 Bl. 458-9-

An illegitimate can have no other right than he acquires, because being nullius filius or filius proprius, he is akin to nobody but his own issue as it respects inheritance & therefore can inherit nothing -

5 Mod. 168. Le R.

68. Comb. 365-

Com Rep. 2

But this maxim, nullius filius does not hold to all purposes, for it does not hold, in the case of marriage within the levitical degrees. An illegitimate child cannot marry his sister, &c. Nor does the maxim extend to cases where the Law recognises the consent of Father & mother to a marriage. Here the Law recognises the relation of parent & child, & I conceive the consent of the father of an illegitimate minor child is necessary to his marriage, when he is known by being compelled to support it

15 R. 96-

100 -

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1 S. R. 101. — This maxim applies only to cases of inheritance.
 Littl. 188. — The foundation of it, is the rule of Law
 that he cannot inherit, & Littleton says, he
 is quasi filius because he cannot inherit.
 He is in fact nullius filius, so that the
 rule is the foundation of the maxim & not the
 maxim the foundation of the rule.

This case applies to a derivation settle-
 ment. But this is a species of inheritance.
 It is a right derived by Law from Parents
 to children; therefore not against the rule.

1 Inst. 3. — An illegitimate child has no surname by inheritance.
 1 Mol. 458-9. — tho he may acquire one by reputation; because he
 never derives one from his mother, & his father is
 unknown. His Christian name is never acquired
 by derivation, descent, or inheritance. It is a name of
 baptism.

Law. Dec. 319. 358. — An illegitimate child may purchase by his
 1 Inst. 3. Perk. sec. 26 acquired name, but he can take nothing by his
 name unless he has acquired it by reputation.

The maxim as applied to this case, is in precise
 conformity to the rule as laid down by Bulker.
 He cannot claim by inheritance. So also an
 illegitimate child, may purchase by the name

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& description of A.B. the son of J.S. if he has gained the reputation of being the son of J.S.

The reason that a bastard child cannot inherit from any person is said to be the uncertainty of the father - that he is filius nullius; but this I apprehend cannot be the true reason, for there is no uncertainty of the mother, yet he cannot inherit even her estate - so if the putative father afterwards marries the mother, here it plainly appears he thinks

Coarb 366 -

Ld. R. 68 -

there is no uncertainty, yet still the child shall not inherit - It is then a rigid rule -

there is a leaning in our Courts against the opinion of filius nullius - so that nothing

but the policy of the Law (which is the true reason of the rule) prevents bastards in many

circumstances from inheriting. as where a mother lives & dies single, that her child should inherit her estate. It has been strongly

urged to be adopted in our Courts, & very probably will be, bye the bye. & let the issue

1 Bl. 459 -

of bastards can inherit. So where an illegitimate child having acquired by his industry a handsome estate which he always intended his mother should have

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For whom he had the most filial affection yet neglecting to make his will, it was held that the mother should not inherit it. & the Court were so strongly inclined to break over this rigid rule that there was only a majority of one in favour of it.

An illegitimate child can take nothing under the description of Issue, because issue as generally understood means "heir of body." He cannot therefore be devisee under the description of Issue because he cannot be heir. He can not gain a surname by reputation or the reputation of being the son of J. P. but by continuance of time. At the moment of birth, or immediately after he cannot be said to have acquired a name. If a devise be to his "eldest son", & such child is an illegitimate one, he cannot take the devise will go to the eldest legitimate son: but if the devise be to him, by the name he has acquired by reputation, he will take. So if the devise be to his "son William" now in the service of the Duke of Savoy & his name was Richard yet he will take - Here, tho' the father had forgotten, or did not know his name, still as it may be rendered certain who he meant, the son shall take the bequest.

1 Inst 3^d 660b5.

Pow. Dev. 338-

10th. 410-

Co Litt 3-

Pow. Dev. 319

338 -

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Row. Dec. 338-

1 Inst. 3rd

10 Pym 529-

1 Bac. 309-

If a Contingent remainder is limited to the eldest son of J. S. legitimate or illegitimate he having none at that time, if afterwards he have a son that is illegitimate, that son can not take; because when a contingent remainder is limited to a person not in esse the remainder man must be able to take at the time he is in esse which here is not possible, he having acquired no name by reputation. But it has been said, that precisely such a limitation to the eldest child of a woman, legitimate or illegitimate is good & will take effect, because in this case, no continuance of time is necessary for him to acquire the name of his mother. As to this, I do not conceive the Law is settled. If only continuance of time rendered the person in the former case unable to take such a remainder, it would here to be sa he is visited in the case of the woman. But this is not the only objection. The limitation is upon too remote a contingency. The future birth of an illegitimate child is a potentia remotissima. The Law presumes that an

1 Inst 3rd note

10 Pym 529-

Co. Elia. 510.

2 Bl. 170-

unlawful and never will happen only on a remote probability. Now it is a rule, that a contingent remainder is not good when limited upon a remote probability. Blackstone calls this a remote probability

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This subject is considered at large by Hargrave
 who he leaves it in debate. The better opinion is
 however that such a limitation would not be good.
 An illegitimate child (as before observed) can have no
 heirs except of his own body his own lineal descen-
 dants. And the reason is, all other kindred must be
 traced thro' some common ancestor - but he has none
 in the purpose of inheriting. When the proprietor
 from whom any thing is claimed, is illegitimate
 none but his lineal descendants can obtain from
 him - his collateral relations cannot. The illegi-
 -mate child is the proprietor.

Inst 3rd
 18th 159,

Upon the principle that an illegitimate
 child is filius nullius, it is holden in England
 Sale 429 - that the settlement of an illegitimate child, is in
 18th 362-3 the parish in which it is born. The place of one's
 459 - birth is always prima facie, his place of settlement.
 I therefore throw the onus probandi upon the
 parish. & now how is this to be obtained? What
 first is certainly his presumptive settlement; &
 there can be no derivative one, as he cannot
 inherit any thing, he belongs to that in which
 he was born - yet if it can be proved that the
 mother was persuaded by the seducer of the town
 to go into another town in order to live in, for
 the purpose of avoiding the expense of maintenance
 there, they would be liable, tho' she complied.

Day 4 -

The place where the mother has a settlement
 however is regularly the place of the child.

So that where an illegitimate child lives during the first year of his infancy with his mother for nurture, still if her place of settlement is different the parish in which she was settled must support the child during nurture. This must mean however that she has gained no settlement then at the time of the birth. For if the mother, tho' legally settled in the parish of A, yet is resident bona fide in the parish of B, & is delivered there, the child's settlement is B -

1 Wh. 1159 -

Palk. 121 -

yet if she goes into another to beg, & is taken up as a vagrant & is delivered of a child the child's settlement is that of the mother - because the Law will not allow her to gain a settlement for her child by her own wrong, or a violation of Law.

It has been a matter of some speculation now for the maxim that an illegitimate is nullius filius applies in Com. I think it applies here precisely the same as in England, except in the case of Settlement. For it has been decided ~~there~~ that the mother's settlement is that of the illegitimate - yet it has also been decided by the S. C. Enos & by the Legislature that the mother cannot obtain the estate of her illegitimate child, as being out of kin - I have therefore no idea that an illegitimate child can inherit here - If one marries in illegitimacy & the

the marriage is void according to Ecclesiastical decisions the not so at Common Law - Illegitimate 2 parts ^{in many} England must obtain consent of Parents to marriage, not necessary here in this

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Lecture 12th

The duties of Parents to their illegitimate children

1766. 457
The duty of these Parents consists chiefly in their obligation to maintain them. The obligation of a Parish in England or of a Town here is only secondary to that of the Parent. Parents then are bound to support their illegitimate children: for tho' as to civil purposes, municipal Law does not regard the relation of Parent & Child, yet as to certain duties it does recognise this relation. The Duty of maintaining an offspring is imposed by natural Law as the Parents are the means of bringing human beings into the world it is their duty both by the Law of nature & the Law of God that they should see these beings do not suffer. The proceedings in England for enforcing this duty are by two Statutes, 18th Geo. 3^d & Geo 2^d by virtue of these, the Father & mother are both liable for the support of their illegitimate children. In England there is no remedy for the mother against the putative father, as in most parts of the country, but by the town & the mother. In England the civil magistrates upon complaint made by the parish officers, issue process against the putative father & make an order of visitation under which

1766. 458 —
Sec. 317 —

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order, the father binds himself that the parent shall not be burthened with the support of the child.

In Con. the father & mother are both liable for the support of their illegitimate children - as well as generally two this country: & the proceedings are as follow; - a. Complaint is made by the mother upon oath to a magistrate, who issues his warrant to apprehend the person whom she charges as being the father of the child - which complaint is usually made before the birth - The party charged is brought before the magistrate who makes enquiring of the mother, as to the truth of the charge - The magistrate in his discretion is then to bind the father over to the next County Court in which the child is born, for trial - by "discretion" is not meant that he is to bind of course, but only if he thinks the evidence is sufficient proof of guilt - The magistrate can only bind over the party, or discharge him - It is only a court of enquiring like a grand jury. The County Court has final jurisdiction of the cause. In the enquiring before the magistrate & the County Court, the mother is a competent witness as necessitate rei, altho she herself is seeking her ransom - & very frequently she is the only witness - The process issued by the magistrate, as a criminal process, is his capias.

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a forthwith process. The form of the process, is criminal, the object, civil. If the proceedings were not criminal the Defendant would avoid it.

J. F.

It has been generally supposed that the complaint must be made by the mother, to entitle her to her remedy, before the child is born. There are some strong reasons to support this opinion. There is a monstrous case. But in the hands of an unprincipled woman, & she has a decided superiority over the other party. (A man of good family & reputation once had such a charge, when at the birth the child was a mulatto!) Yet altho there ^{are} such strong reasons, it appears to be Law that it is not necessary. The oath of the mother is not indeed conclusive. It is only prima facie good & throws the burden of proof upon the Defendant. Her testimony in this respect, is like that of all other witnesses. She may be impeached & her testimony invalidated as to her character for truth & chastity. — But the Defendant who is not good against her oath & he himself cannot take his oath. She is to be put upon her discovery in the time of travail & the hour of danger, & this is a great check upon her. It is undoubtedly a wise & politic provision of Law. It is a line qua non of the mother's recovery. It is a condition.

precedent, & cannot be supplied by any other -

But when the town prosecutes for its own security, this requisite is dispensed with, & the mother is considered as an indifferent person - This has been well settled in Connecticut -

The Statute here, requires that she continue constant in her accusation. She must not charge one before the magistrate & another before the County Court. You are not to have & another in Court. This is absolutely necessary that she be constant & uniform in her accusation & even the confession of the father is not sufficient because there is a presumption of Law, which cannot be rebutted - If upon the prosecution before the County Court judgement in chief goes against him, the judgement goes that he find sureties to pay the damages assessed & also is required that he find sureties to save the town harmless from the support of the child if he refuses, the Honor Committee -

The damages assessed are accruing to the practitioner, & are intended for the child's support until he is 14 years old. But they are not collected as in ordinary cases of Common Law. Executions are regularly issued quarterly, each for one sixteenth of the whole sum. If in the mean time the child dies subsequent Executions are stayed, & therefore she may not have all the damages assessed by Court.

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If it is afterwards found that the expense of supporting the Child greatly exceeds the damages assessed, the Father is compellable to pay more upon application to the Court & the addition is made it will be added to the execution as they severally issue - the damages are considered as an estimate of the expenses, which may be incurred if not sufficiently large.

If the Child is not born during the pendency of the Court, the case must be continued & cause as prescribed by the statute & the Court will order a removal of the Child. If he does not obtain a removal or surrender himself up his bond is forfeited.

1 W. 458 -

It is said by Blackstone, that if the mother of an illegitimate Child dies or is married before delivery, or suffers an abortion the Defendant is discharged. I suppose the means by which he is discharged from all liability. In the case of her marriage if this is his meaning, I doubt the rule; for suppose she marries & afterwards is delivered of a bastard Child, he is not of course forever discharged. By the ancient rule of the Common Law, mentioned before, viz. - if the Child is born during wedlock, it is legitimate - except in two particular cases, this rule would be true, for as the Child would be legitimate the real father could never be subjected. But as the

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all now is, that the child maybe proved to be illegitimate, as any other person may be; if the child can be proved to be illegitimate, the husband of the woman is not bound to be bound to it, neither is she alone. Therefore the real father ought to be considered as much as if she had no husband. In the case of death & abortion, the issue is undoubtedly true. It has been said, that if a woman has an illegitimate child & survives before recovery, the husband cannot join with her in a prosecution for it. He is not bound, because he is not compelled by law to suppose a child. I think he may so join. For either the right of the wife is totally extinguished or the husband has a right to join. It is a nice question, & according to the principles of the English law in this respect, viz. that all born in lawful wedlock are legitimate, the father is clearly discharged. But after all this stands precisely as all other rights of the wife, they are vested on marriage in the husband. Before marriage she was bound only for half the maintenance & the husband can be under no further obligation, as she had a right to receive the other half of the father. Clearly the husband has now the right to join in the wife in an action for its recovery.

1 Swift 211-

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The bond of indemnity, is to be void on appearing in Court & answering final judgment. In this case the surety on the bond is not discharged under the Statute of Limitations until a year from the last quarterly payment altho the Law of Bail is, that under the Statute of Limitations, the Bail shall not be bound to respond the judgment given against the Principal, unless an action is brought against them within one year from the time of judgment given. Now if this were the case in the present instance, he would be holden only for one fourth of the original damages as the Exon. time quarterly. Therefore in prosecutions of this kind it is settled that the Bail shall be bound not only for one year, but one year after the last payment is due.

Thus far for the mother's remedy, now for that of the Town or Parish - If the mother does not prosecute for the support of her illegitimate Child, the selectmen of the town in which the Child is settled may prosecute the father in behalf of the town the object of which is to compel him to give security to save the town & parish from expence - This they may always do, unless he voluntarily enters into security when it becomes necessary - The object of the prosecution by the mother is to obtain support for the child, & that of the town to oblige him to enter into security of saving them from expence in case of pauperism - The consequences are also different - At any rate the town are not obliged to support the Child while the mother is able.

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If the mother commences a prosecution & abandons it the select men may put in their names & proceed in the same suit, not for the benefit of the mother but for that of the town. If the putative father judges against him fails to advise aside by it, he is considered as a criminal & is not entitled to perjurious oath - That the mother has sworn before a magistrate on her examination may be given in evidence after her death to support an order of filiation, or in other words to subject the father according to a general rule of evidence that what a witness has once sworn to before a proper tribunal may be given in evidence after his death in the same suit between the same parties - & those who heard her swear may swear to what she said -

It has been a moot question, whether on a prosecution by the select men, the mother is compellable to testify who is the father - It is certain she can never be compelled to testify to anything that will criminate herself. This she does not in the present case; she is only informing the court, who joined her in the commission of the unlawful act. The question is not whether she had an illegitimate child - this is taken for granted, the crime is already sufficiently disclosed - were this the fact to be proved she could not be compelled to testify. It has been said she is not compellable to testify because

5 J.B. 343

Swift 211

Parent & Child

we have not the same power as in England
 this is no argument for we have a power to compel
 all witnesses to testify - It has at length been decided
 in the Supreme Court in Connecticut that she
 maybe compelled to testify - if this decision was
 on the ground that she did not thereby criminate
 herself, it was right. But the great objection
 is that it becomes a cause of domestic discord -
 Suppose the real father to be a married man
 of good reputation & amiable family, & the
 mother does not wish to injure his innocent
 family & his character, now if the towns
 aversars may contrive her to testify who is the
 father, it may occasion disgrace to innocent
 persons - as the wife & children of the father &c
 There are no decided cases in the books. If
 indeed it was for the purpose of establishing the
certain rights of another, these circumstances
 might give place perhaps, but as it is
 a contingent right, I do not think it should
 be carried into effect.

In England there is a rule that the mother
 shall not be compelled to testify in favour of the
 parent until one month after the birth of the
 child; the reason is she is not in a fit state before -

another question has been started, whether if an illegitimate child is born during wedlock the husband is obliged to support it? decided that he is not.

It has also been decided here, that where the mother prosecutes for support of an illegitimate child, she is compellable to testify as to her intimacy with other men - for this testimony goes to invalidate her evidence in the point at issue.

The trial is now, if it has not been, by the Court & the reason of it, is derived from the Statute, it provides, or implies generally, that the Court & the Jury are to determine the guilt & assess the damages. The prosecution against the putative father is mixed, partly civil & partly criminal: civil in object & criminal in form - hence it has been a question whether depositions can be admitted as in any civil case - in which only they can be admitted. It has been decided that they can, & that form shall yield to substance.

Again - In criminal cases there lies no appeal from County Court to the Supreme - & it has been decided that no appeal lies in this case the former is denied. Thus far as to illegitimate children - Now I am to consider

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- The duties of Parents to their Legitimate Children. They consist principally in three particulars - 1st Maintenance. 2nd Protection. 3rd Education. 1st As to Maintenance. This is a principle of Natural Law - mere maintenance consists in providing necessities & this duty is reciprocal. But there is a distinction between their obligation to support their minor children & their adult children - The rule is
- 1 Bl. 449 - The parents are bound if able to support both when adult - but minors absolutely & in all events, for a minor is presumed by the Law never to be able to support himself -
- Pro. Ch. 268 - 387 - therefore no parent can allege that his minor child is able to support himself, for the Law admits no such plea - With regard to adults, it is not so - The rule here is that the parents if able, shall support their adult child who is unable: yet in this case, the parents may show that the adult is able -
- 1 Atk. 399 - Am. Books do not explain this distinction -
- Hendon vs Wilson S.C.C. Court of Chancery - On the other hand the same obligation rests upon children & grandchildren to support their parents at supra -
- 2 Bulst. 345 when unable - Our statute in this respect differs from Stat. 283 - the English only in this, that in England it is questioned

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whether grand children are ever compellable to support their Grand parents. But in almost every State in the Union there is a Statute to this effect. Under these it has been held that grand children are not bound when the children are able - but if parents are unable, they are - & the assessments are generally made according to ability of each - and the one child has received much from the parents & has spent it, is like the other who rec^d. but little, is rich; yet the proportion of each shall be according to their ability & this ability materially depends on the condition of their families. as if two are each possessed of ten thousand each, but one has a family, & the other is a bachelor, in this case the latter shall pay more than the other, in proportion to his expenditures.

It seems to have been thought that a free man marries a wife having children, this second husband is bound to support them during infancy, & this whether ^{he} was before able, or not - at any rate this is the usage & probably hence the opinion I doubt whether the general impression is right. In England the second husband is not bound & here

2 Feb 1864

3 C. / 12.1

2 B. 1. 346

Ms. No. 955.

4 L.R. 119 -

* Or rather, he is bound if he takes the children home with him & stands in Cocoparentis: & as he is not liable. 4 T.R. 118. 1 Str. 140. 3 B. & A. 2. 1. 2. also Rom. Com. 166-7 n

177.448

Mr. 190

2 Bulst. 345

115.24.

He is, or is not, at the case may be - It all
 went, he is not bound the moment coverage
 ceases. In England it is abundantly settled that
 he is, not bound - & it is laid down without any
 qualification. The Law for enforcing maintenance.

was made for enforcing natural studies. The Stat
ute of Univ. extends only to natural relations.

so were the Statute of Con. for^m transcribed from
the other. The true principle is, that the husband
is bound in the case supposed if she was, for he
takes her cum onere; if she was not, neither is he.

The objection is that it extends only to natural relations - Be it so - It extended to the mother when she was a widow - It was incumbent on her when she married. How does it not take her with her legal duties? Why the wife may be worth \$10,000 & the children four hundred, if it were

It has been repeatedly decided that the husband was not obliged to maintain the wife's parents. This is a measure of policy, as the contrary would tend to create family dissensions: & the statute extends only to natural relations -

In obliging the husband to uphold the child by a former marriage, he is supposed to know at the time that he takes her with her father. But in the last case this can not

be supported. The parents are generally not obliged to be supported until 21 age.

It has been settled that one is bound to support his son, wife after a divorce a mensa & thoro; a portion; not after a divorce a vinculo et matrimonium sed quere de hoc.

There is a single rule relating to paupers that may be here introduced. In New York there is a statute enacting that where a man dies without issue, leaving a wife unable to support herself, & having no relations bound by Law to support her, his estate in the hands of his heirs & legatee, shall be charged with her support during widowhood.

Lecture 13th

The duty of support is enforced in Canada, by Stat. by applying to the County Court in the form of a memorial - & in ordinary cases an action at Law will not lie. The duty in England is enforced in the same way, by application to the Court of Sessions.

This rule, that an action at Law will not lie is enforced strictly with regard to paupers. For if the party fails to support his minor children, an action at Common Law will lie in favour of third persons who have supplied them with necessaries against the latter. The application to the Court may be made by any of the relations who are bound to support, or by the select men.

Case R. 1251.

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On this memorial, all the parties who are bound
to support the pauper, are cited. & when assessments
are made they are to give security. If it be not
Execution will issue quarterly against them, in
the name of the memorialist. - We have now
gone thro with maintenance, & come 2^d

to speak of Protection. This is a duty arising
out of natural Law, & then permitted, then
enjoined by municipal Law. - The Father
is not compellable to protect his child, for
he cannot be punished for not doing so, neither
is he civilly responsible for not giving it - as
if the Parent sees a stranger beating his son, he
need not interfere, & the son has no remedy against
the Father for not interfering - But the Father

1 M. 480

2 Inst 564

1 M. 540

may interfere. And at Common Law he may
uphold his child in Law Suits, without being
guilty of Legal maintenance. So that a legal
maintenance between these persons is
not such by reason of the relation of parent & child.

Cro. Jac. 296 -

1 Hawk. B. 83

So also a father may justify a battery in
defence of his son - that is, he has a right to
use the same force which the son might -
So that this right is not such as every one has to
prevent a breach of the peace, for the father may take
the part of his Son & use as much violence as the son might

1 Mo. 450 - These rights are reciprocal. The Son has
 1 Hawk 131 - a right to maintain the Father Law suit - to justify
 Father in his defence &c - There are few more
 in the books on this subject.

(3rd) Education. This is also a natural duty

1 Mo. 451 - In England there is no provision to enforce
 196 - this duty, except that overcoercive law, poor law &c. runs
 out as apperances - & Father &c. can send his Child
 down out of the way down to his education in popish faith.

In Connecticut there is a Statute enjoining it
 upon all Parents & Masters Guardians &c. to teach
 their Children to read their own ^{names in English} &c. according
 to their ability to read the English language well,
 & to know the Law respecting capital offences - &
 also to learn them some orthodox catechism
 in English, or penalty is annexed. It also provides
 that the selection on failure of the Parents, doing
 their duty, may be the Children & bind them out
 as apprentices - males until 21 - females 18 - The
 expense of Common Schools in this State is between 37,000
 & 38,000 more than all the other taxes of the State -
 I was says Judge Reeves for eight twenty years
 in a lot is called full of business ^{in the practice of the law} & during that
 period I never met with but one person who
 made his mark!

Parent & Child

Duties of Children towards Parents

His main duty is to obey their lawful commands, & be subject to them during Infancy - & to support them when poor, & also to protect them when necessary, tho the latter cannot be enforced -

The rights & Powers of Parents

The parent has a right to correct his minor child in a reasonable manner. This arises from his duty. He is bound to educate & support his child & for this purpose he must have an authority given him over his child. And the exercise of this right, of correction or domestic government must be in a great measure discretionary. But if he exceeds all bounds of reason, and

178 Bank 130

moderation, & shows what the law terms molestation, he is punishable. And I have no doubt but an action in favour of the child would lie in such a case. Indeed there was an instance in N. York a few years since, where a father threw a son 7 years old down stairs & stamped on him, an action was brought & £7000 recovered by the child against the father. The child clearly has a right which the Law will protect against the unnatural brutality of the parent. What however is severe in one instance, might not be so in another. The true ground is, the

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Parent acts in a judicial capacity & is therefore
not answerable for errors of opinion - So if he chastises
his child unreasonably in the opinion of most men - yet
if it appears he did it for the good of the child, or that
such was his intention, he is excused - The temper
of the heart is the governing principle - the time, place
& instrument used are all demonstrations of this temper

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These observations are equally applicable to School
-masters & Masters - they stand in loco parentis

Parent & Child -

Another instance of the power over the minor child is that of marriage - He may withhold his consent to the marriage - and the consent of the parent & Guardian is absolutely necessary both here & in Eng. in the case of a minor child. In Eng. if this consent is not given the marriage is absolutely void & the issue illegitimate - But in Con. the marriage is good, but the person who solemnized it is punished by fine.

1 Bl. 452.

Every father has a certain power & control over the estate of his Infant child. A minor child may hold estate real or personal - But the parent has no other way over it, other than in the character of trustee or Guardian and he is compellable to give an acct of his trust when the child arrives at full age, & as the case may be, before that age - This power belongs to him as Guardian - He has no power over it strictly speaking as Parent.

1 Bl. 452.

A minor child is entitled to all the prop^y that he can acquire otherwise than by service. He may purchase & it is only voidable for he may hold it if he pleases. & if prop^y should be given him by deed or if a ticket is given him which draws a prize, etc. he is entitled to it.

1 Bl. 453.

1 Swift 206.

But the parent is entitled to every thing which is procured by the Labour of his minor child, because the Labour of his minor child is his own - The child is strictly his servant - and I conceive a parent can no more make a gift of his child of his earnings to the prejudice

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of his Creditors, than he can give him any other estate.

The right of the parent to the service of the Child is the foundation of all those actions which he lays with a *per quod servitium* & for having beaten or otherwise injured his minor Child by which he has lost his service, & he recovers in the Character of Master —

But a Father cannot maintain an action for a mere Battery or an immediate personal violence done to his Child — for here the action is to be brought in the name of the Child who sues in the name of his parent or next friend — The Father has a remedy for the consequential damages. Now if the parent has been at any expence by reason of a personal violence done to his minor Child, & during a week, he is entitled to recover this expence in the action *per quod* he provided he lays it *specifically* as a ground of damages; otherwise he cannot — for it would be the same as if he should not lay with a *per quod* he in which case his declaration would be demurrable —

Upon the same principle an action lies in favour of a Father ag^t the seducer of his daughter, if it is the loss of his service — i.e. no action will lie with^t this loss of service: all the rest is matter

Peake. R. 233.

4 Co. 113.

Err. 645.

1 R. 259.

3 Wils. 18.

La R. 1032.

Err. 645.

3 Brown. 1879.

2 R. 168.

Err. 645. 769.

2 Rest 320.

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3 wils. 18. of aggravation - The expense incurred during his
F. R. 259. daughter's illness may be recovered if specialty made.

But the the loss of service is the ground of the action, yet it is not the rule, nor the principal ground of Damages - The real damage is the injury & disgrace to the family & services have often given enormous damages where the loss of service was fictitious or very small -

Quils. 19. That loss of service is not the ground of damages is evident - for 1st any kind of service however small is suff^t to entitle the father to a recovery for a loss of service & 2^d the Character of the daughter governs the damages in a great measure; for her gen^l character for chastity will aggravate or lessen the damages - and in a late case where a father had connived at an intimacy with his daughter, &

Ocate 241. the Def^t. being a married man, Lord Kenyon - decided that the actⁿ would not lie - & soon after decided that it would be suff^t if the daughter lives in the parents family, for she would be deemed a servant as a matter of course & the loss of service would always be presumed - This is not opposed to the gen^l rule.

And it is well settled that the age of the daughter is not material, if she actually serves her father - It is not necessary to prove a contract for service

Ocate 55.
233.

Parent & Child -

Smith 18.
2 T. R. 140.

made between parent & daughter - & recovery has been had where the daughter was 28 years old -

This distinction however may be taken - If the daughter is under 21 yrs of age, she is of course revert - But secure if of full age, for she may live there as a boarder.

Exp. 645.

It is laid down by Exp. that for the purpose of maintaining this action the daughter must live in the house of her father at the time of the injury - this is not correct - Suppose the daughter is living at a boarding school will this prevent the father from recovery? or suppose she is living in another family for the benefit of the father, would he not have an action? There is no authority in the books to support the opinion -

In the case of an adult it is necessary that she should be proved to have actually seen her father as a servant -

Exp. also says that the parent cannot maintain this action unless the child is a minor & cites same case but it is not so -

This action will lie in favour of any one standing in loco parentis, father, mother, guardian or master, & it has been supported by an aunt in the case of a niece -

11 B. & C. 22. Is too in favour of one who had adopted the child, & visited altius the mere loss of service, supported.

Parent & Child

27/3

Leck 14th - In the action per quod servitium, the daughter is a competent witness on either side, for or ag^t the parents; & even while the rule was that an interest in the question disqualifies the witness, she was permitted to testify ex necessitate rei altho she had an interest in the question - but the rule now established is, that it must be an interest in the event to disqualify the witness, which the daughter has not for she has an act whether P^{ff} recover or not.

3 Wils. 18.
1 Port. 472.

1502 161 This act is properly & substantially an act on Land & P^{ab} 1. The case above there is no illegal entry into the 9-13 P^{ff}'s house - tho the form in Q^y has often 502 361 - 600 times (unnecessary) been Tnd up in to wrong. 3 Wils. 18 - There is no doubt that it is Case - for the 11 Port. 23. - Consequential damage - the gist of the action and then it is always Case - And it is universally the form in Case.

But when the Def^{or} has illegally entered the P^{ff}'s house & done the injury
Leck 1032, the P^{ff} may sue for breaking and
Leck 206. 642 entering the house & have all the rest
202 167. 8 as mere matter of aggravation - as
14 Bla 555 the ground of consequential damage - and then the action must clearly be

Not de facto Tnd up -
July 28 1810

Parent & Child

But it is to be observed that whenever the action of trespass is set on foot in such a case as this, i.e. where the gist of the act is trespass with force, any thing which justifies the original trespass will cover the whole declaration & defeat the action - as in the case supposed if Defor can prove a licence to enter the house -

and this is precisely analogous to the rule in other cases. For it is established that if one sees another for unlawfully breaking & entering his house & as matter of aggravation states that the Defor injured his furniture, beat his wife & children &c. &c. if the Defor can prove that the original entry was by licence it defeats the action - It is always therefore better to bring an action on the case.

2 D.R. 188.

2 Per. 84.

Mr Smith says that such a licence to enter is no justification, for the subsequent wrong makes him a trespasser ab initio. This is clearly incorrect. For two reasons - 1st No person can be a trespasser by relation, except where he first entered by licence of Lord & not by the licence of the owner. Yet enter the House of B for the purpose of carrying on a rogue & commits a wrong he is a trespasser ab initio; but if he entered by virtue of a licence from B & then committed a wrong he is not a trespasser ab initio. 2^d A man is not made a trespasser by relation unless the subsequent wrong amounts to a breach of the peace i.e. to a trespass. The wrong now in question is not of that nature.

Perk. Mc. 191.
8 Co. 146th
great case -
April 95. 7.
12 R. 120
2 Per. 2. 12. 14

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It has been a question much debated whether an act^r will lie for taking away P^rts Daughter with^o alleging loss of service or any other special damage - The authorities are contradictory - The better opinion is that an act^r will lie - an act^r lies at com. Law for taking away the heir by a writ de herede rapto - The parent has certain duties to perform, & the Law gives him certain rights as the custody & service of the child - now it would be ingratum for the Law to give a right & yet give no remedy for a violation of that right - It would be a solecism - The right to the custody of the child is vested in the parent ^{as father} & not as master - The rights to the custody & service there, are two totally distinct things -

The parent authority of the father over the child ceases when the latter attains the age of 21 yrs, & every person becomes of that age on the day preceding the twenty first anniversary of his birth. The mother as such has no authority over the child - by this is meant she has none during the coverture - for if to the most extreme a sovereignty in state of the husband - the authority is vested by Law in one person. When the husband dies, she as mother & guardian has a personal authority over the child during the years of minority - She in such case has certain duties to perform & therefore must have a power of controul over her child - It is very notorious however that mothers do exercise family discipline & in all these cases I suppose she is presumed to act with the husband ^{intend}

2 B. 130.

Bro. P. 1790

1 B. 30. 200

3 B. 386

1 W. 453.

Parent & Child

How far the Parents may be liable for the acts of the Children — This has been noticed under the title of Master & Servant — I will only lay down a few general rules —

1st The Father is liable for the torts of his minor children under his care, to the same extent to which a master is liable for the torts of his servants. He is liable in the character of master. The Children however should be under his care, for if he has delegated his power to a master ~~the~~ master will be liable —

2^d as to contracts made by minor children, a parent at Com Law is no otherwise liable on the contracts of his minor child, than as a master is, on those contracts of his servt except in the single case of a child's contracts for necessities — By the way a master as such is never liable for the contracts of his servant for necessities — When he is bound to support, he is bound by a contract express or implied — a Father as such is bound to supply his child with necessities — with this exception the liability for the contracts is the same in both cases of Parents & Master —

3. Under the Stat of Eng & Hon, there are certain cases where the Parent is bound to pay fines & penalties inflicted on minor children — Sometimes master and bound — As fines for salt & tobacco, working on highways, neglect of doing military duty &c. And under our Stat if a minor child has alienated contract by his father, for himself, does so contract his father is bound, for having permitted him to make it — In this instance under our Stat, the master is bound — proceeding in this way — these general rules will include all things necessary under this head

Stat 228
308. 370

Stat 293-

Parent & Child.

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Sect. 15th Different kinds of Guardians with their Rights & Duties -

"A Guardian" is defined to be a temporary parent, or person standing in loco parentis during a child's minority - and a child under the care of a guardian is called a "Ward".

In Eng. the Guardian has the charge both of the person & estate of the ward. This proposition tho true needs qualification - The person & estate are both under the care of some guardian - yet the person may be & frequently is under the care of one guardian & the estate under the care of another -

By the Roman Law the person was under a diff^t guardian from the estate - The former was called Tutor, the latter Curator

The kinds of guardianship known to the Rom. Law are four - & first -

Guardianship in Chivalry - now out of use

1 Inst. 88. a. 11. It obtained only where an estate helden by knight
2 Bl. 67. 77. - Service came to the Lord by descent, & continued one male ward, till they attained the age of 21 years & females till 15 or till married - It extended to the persons & lands of the ward within the regnory & was assignable - This was abolished at the restoration when Tenure by knight service was abolished.

Guardian & Ward

(2) Guardianship by Nature This is mentioned

3 Co. 38^a in some of the books as if it was confined to father
 3 Co. 41^b & in some as if confined to both parents. But
 1 Inst. 88^b at Com. Law; father & mother or any other ancestor
 note 12 of the minor might be guardian by nature -
 Thus the claim of the father is first of the mother
 record; & among more distant ancestor claims,
 were according to proximity of blood & where
 there is an equal claim between two or more
 priority in the possession of the ward person
 decides the right to the guardianship -

This kind of Guardianship extends to the person
 only & not to the estate of the ward & continues
 untill ward attains the age of 21 yrs. By this is not
 meant that the father has no control over the
 estate of the ward in any relation - He has such
 control, but not as natural Guardian - (post)

3 Co. 38^b loc. cit. 388 This Guardianship extends only to the heir
 1 Inst. 88^a 88^b apparent of the ancestor. No other person can have a
 guardianship by nature by com. Law. It does not extend to his
 other children. And it is questionable whether a female
 may have a Guardian by nature as she can never
 be heir apparent. This is only her presumption.

But here it is to be observed that in Com. all a
 man's children are his heirs apparent & so the Union

& under our Law the trust of what we call a natural Guardian extends to the Estate, as well as to the person of the ward -

In Eng. the Father may supersede the claims of all other ancestors by appointing a testamentary Guardian by deed or will, to his heirs apparent by virtue of the Stat. 12 Geo. III.

Litt. sec. 114
3 Geo. 8th.

When the Father is the natural Guardian the person of the ward is in his custody in preference to the Guardian in Chivalry. But this is not the case with any other ancestors. But it is of no consequence.

It is true in Eng. Parents are styled the natural Guardians of all their children. By this is not meant that the parent is such at com. Law, but such as the Law of Nature designates as the proper guardian of all his children. And the Chancellor, there being no guardian to the younger children appointed by positive Law, will settle the Guardianship upon the Father, & as the case may be upon the mother.

1 Inst. 88
note B

3- Guardianship by Loco - This takes place only where an infant under 14 is seized of Lands descended by descent & holden by some person. This guardianship belongs to the nearest of kin to the 2nd to whom the land cannot possibly descend. This rule is framed to prevent the temptation to abuse the trust - "consuetudo agitur sup^a."

168. 1022.
1 Inst. 88 n. 2.
2 Inst. 170.

Guardian & Ward?

Among those who may claim this guardianship there is no distinction between the whole or half blood. If two or more are in equal degree, priority of power of the person of the ward determines the right except among brothers & sisters where the eldest is preferred & among collateral male, are preferred. By brothers & sisters are meant those of the half blood, as those of the whole blood may always by possibility inherit.

1 Inst. 88^a
note 13.

2 Bac. 683-4
Cov. Dec. 98.
2 C. W. 122.

1 Inst. 84^b 89^a
note 13. —
Butt. 17.

The guardian in socage may leave the estate of his ward until the latter attains the age of 14 years, & may maintain ejectment in his own name to recover it.

This kind of Guardianship extends to the person of the ward, his socage estate, incorporeal hereditaments & his personal property. The custody of the ward in socage devolves after & every species of his property. This is not true of all guardians.

The trust of the Guardian in socage is not like that in chivalry assignable. The office is fiduciary, for the benefit of the ward & not of the

1 Inst. 80^b m. 1.

88 m. 1. 89 m. 13.

Plowd. 293-

Guardian. The Law to be sure creates the trust, but this office is deemed to be in a certain sense fiduciary.

at the age of 14 the ward has a right to enter & oust the Guardian & occupy the land himself. The guardian is then liable to account with the ward for the profits accrued during his possession.

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Litt. sec. 123 & is entitled to his reasonable expenses & compensation
1 Bl. 401-2. for his trouble in taking care of it - He is then a kind
2 Bac. 587. Civilist. The Guardian in socage has no longer any
control, the same other person has. There is an unnecessary
plexity in the Law of Guardian & Ward in creating so
numerous a body of Guardians -

1 Post. 83 n. 19. The Guardian in socage may be superseded by
an appointment of a testamentary Guardian by the
Father.

Is Guardianship for Nurture This takes
place only where there is no other Guardian & extends
Co. Litt. 8 n. 12. to children who are not heirs apparent. It extends
89. n. 13. to the person only & not to the estate, & terminates
when they arrive at the age of 14. It is exercisable only
by the father or mother. This appears to me to be
a very whimsical distinction in the Law -

It seems clear that the father cannot be guardian
for nurture to the heir apparent, because he is
guardian by nature to him until 21. on this point
- file it is clear that in Com. there can be no guardian
by nurture, because all the children are here
heirs apparent, & therefore natural guardian to
them all - And natural Guardians take the preference
to Guardians by Nurture -

There are also certain kinds of guardian in socage,
created by Stat. 12 Geo. 2. Stat. 12 Geo. 2. & whether
of age or not, may say, wife or deed subscribed by two

Guardian & Ward

witness, appoint a guardian for all his children who are Infants or unmarried. The father must be of age to make a will. This is inferable from the very nature of the thing. It is true he may appoint by deed, but this is not to take effect until he dies - & it is in the nature of a testamentary disposition & is therefore a will.

He may appoint guardians until his children respectively arrive at the age of 21 yrs. or any other age under 21. This species of guardianship extends to the person & all the estate of the ward. We have no such stat. in Conn. The trust of a testamentary guardian is not assignable. It is strictly fiduciary. The father reposes a special personal confidence in the guardian whom he has appointed & in no other.

1 Bl. 462. 1 Inst.
89 n. 15. 10th 103.
2 do 110.
2 Inst. 129.

2 20th. 14.
2 Conn. 234

There is another species of guardians created by Stat. 4 & 5 Phil. & Mary, which extends only to females under 16. This need not be dwelt upon.

1 Inst. 89 n. 14.
2 Bac 875

1 Inst. 89 n. 16. There is another class of Guardians appointed by custom or local usage. These are immaterial.

But there are certain kinds of guardianship not enumerated by the old Com. Law writers & which are more important than those mentioned & of them -

1. Guardianship at the election of the Infant (This takes place only where there is no other provided by Law or appointment of the father. Thus

The Peft has no lands holden by knight service. He has then no Guardian in Chivalry. He has no lands holden by socage, & if he has he is over 14. He has then no guardian in socage. It is more
 1 Inst. 87^b 89. than 14 he has no guardian by musture. He is not then apparent. His father then is not his natural guardian - & has appointed him none. Hence one may be his guardian at his election. This species is of modern origin - it has been in use since the restoration in 1660. & a little before this. The election is usually made before a Judge on the Circuit by the Peft.

The Law has prescribed no form in which the Peft is to make his election - Ed Ballinor elected his Guardian by deed. It seems probable a parcel election would be good.
 1 Inst. 89. note 10. It is not however material, because the Judge may or may not sanction as he pleases -

There is some confusion as to the age at which he may choose his guardian. The age mentioned by writers is 14. It is also said he may make his election before & after 14. If so the Law has fixed no age - Hargrave says before the restoration the sanction was confined to Peft under 14. It may be at 14. The only doubt is whether the election may be made by an Peft under that age -

Lect. 16 I observed yesterday that there were several kinds of Guardians not known by the ancient com. Law. One of which has been mentioned before as to the

Cytle. 27. R. 172.

12. R. 6. 544

2d Guardians appointed by the Chancellor

This species is of modern date. Chancery has exercised the power of appointing guardians, with opposition since the reign of Wm 1. 1096. This authority is seldom exercised by the Chancellor when the Dft has a guardian duly appointed: but when there is no one appointed

12. R. 6. 544.

2. R. 6. 544.

10. Wm 1. 703.

8. mod. 244.

9. do. 116.

1. R. 6. 116.

his authority is very extensive & discretionary. It extends to removals as well as to appointments, & he exercises the power of removal in the case of testamentary guardians. He interposes very discretionally in the case of Dfts. because the Chancellor represents the King as paramount guardian of all the Dfts in the Kingdom.

The Ct. of Ch. in Com. has no such authority. They have no concern with the appointment or removal of guardians. The power is in Ct. of Probate. In Eng. the power arises out of the monarchical form of Govt.

3d Guardians appointed by the ecclesiastical Ct

The Law as it respects the power of this Ct to appoint guardians appears not to be well settled. It claims the power of appointing both for the person & the person's estate of the mind. The former has always been denied - & lately the latter has been also denied -

11. R. 6. 176.

2. R. 6. 176.

3. R. 6. 176.

4. R. 6. 176.

5. R. 6. 176.

Guardian & Ward p 285

According then to the late opinion the ecclesiastical
Court has authority to appoint only a Guardian ad litem
which is the fourth species of guardianship I am to consider
of Guardian ad litem. This is a special Guardian
appointed for a particular suit, when an Inf^t being a Inf^t 8th
has no Guardian: & such a Guardian may be appointed by
any Ct where the Inf^t is such - even if he has a Guardian
This is never done where the Inf^t is Off^t. Because then he
must always appear by Guardian or next Friend -

And in case of 14th years when an Inf^t under 14 or 15
is presented for an offence the Ct has appointed a Guardian pro
re nata i.e. they have named counsel who were constituted his
Guardians. We have settled no definite age under which they will
appoint a Guardian - I do not know that is done in Eng.

A Guardian ad litem may be appointed by letters patentes
either for a particular suit or as a gen^l Guardian for all suits -
this power is now lodged in the hands of the Ct. There are
all the diff^t kinds of guardianship known to the Law of Eng.

Under our Law there is no guardian in Chivalry,
none in franchise, none by testament, none by custom, none
by appointment of the Chancellor or any ecclesiastical Court.

The only Guardians known to our Law are three -
1st Natural guardians. 2^d Guardians by the appointment
of the Ct of probate; 3^d Guardians (ad litem -

1 Inst. 89. m. 18

135th

Co. 53.

3 M. 427.

1 Inst. 89.

note 16.

Guardian & Ward

A guardian by nature cannot exist in law. Because all the children are his apparent. In con the father is deemed of course to be the natural guardian & this guardianship continues until the ward attains the age of 21 years. Natural Guardianship by the con Law extends only to the person of the ward - but under con Law the power of the guardian ~~is~~ ^{is} ~~not~~ ^{not} ~~to~~ ^{to} the person of the ward but to the property also - and the father's death it is usually the case that the mother acts as natural guardian over her female children until they attain the age proper for choosing guardian. The one may be appointed of course during the life of the mother without formally removing her -

Mod. 13-2

no such distinction exists in Eng. I doubt indeed whether it does here - certainly not authorized by any positive Law. Our Stat. takes no notice of the mother. It speaks of the

Stat. 227

father guardian & master only. The Ct may then appoint a Guardian ^{altho} there is a mother, & Stat. makes no distinction between males & females. But while father is living another

Stat. 458.

guardian cannot be appointed unless father is removed - who cannot be removed except for special reasons. There cannot be another appointed because the father is gent guardian - he is so by nature - I have observed that the mother does not appear of course, or of right to be the guardian of her child: yet she is the person often appointed guardian in con for both male & female: which could not be were she the natural guardian of her daughters only -

Guardian & Ward

Stat. 458.

When the Inft. has no Father, Guardian or mother - The authority of Ct of Probate to appoint one - If the inft. is of age which is 14 in males & 12 in females, to choose a person & the Ct of Probate is to summon him before the Ct to make his election - Yet this electⁿ is not conclusion upon the Ct for it is left to their discretion whether they will accept the Guardian so elected or not - If a male inft. & concern a female also under the age of choosing a guardian, has no father, Probate may appoint one with^o summoning Inft. to appear - it is useless to summon him as he can make no election.

Stat. 207
- 458.

This is not usually done where the mother is living - altho an application may be made by any one to have it done.

Woot. 131-2

2d. B. 20.

I have observed already that a power similar to that ~~which is~~ exercised by Chanc^y in Eng as to removal of guardian is vested in Ct of Probate in Con. The stat. provides that the Ct may in many cases remove guardian - It has been decided by Sup^r Ct that ward has a right to live with his guardian & cannot be removed by the Court from his guardian - This rule relates only to that kind of Guardian existing under an old stat. i.e. extending both to the person & estate of the ward. But where the ward who has a guardian has also a father - he is obliged to live with him because he has a power over the person of the ward notwithstanding the guardian so appointed - When a guardian is appointed for an Inft. under the age of choosing - the authority of the guardian continues of course until ward attains 21 unless when he attains the proper age for choosing he appears before Ct of Probate & makes choice of another Guardian to the acceptance of the Ct -

Kerly. 252 -
256-7.

The Guardian & Ward.

our law provides that probate shall take security of all guardians appointed by them for the faithful performance of their duties. & when the ward has an estate, the guardian appointed is to give security, secus not. & also acct with Co^t of wards when he attains 21 or before if Co^t think proper. Guardian however is not liable to be sued in an act of acct by the ward for not

1 Root. 51-2 accounting a wife ward in a minor under. He is first called upon to acct by Co^t of probate - He is bound of course to acct when ward attains 21 - & then ward may sue in an act of acct

1 Root. 89. n. 7. In Eng. also every guardian except in chivalry is compellable to acct for the profits in their hands -

The usual remedy for the ward in Eng. ag^t his guardian is a bill in Chy. Chy. judges have taken cognizance of all matters of acct - & nearly engrossed them all -

Indeed the jurisdiction of acct seems to be swallowed up by that of Chy. very seldom the case that an act of acct is tried at Law.

1 M. 453. By a bill in Chy. the remedy is vastly more extensive -

2 Bac. 677. Guardian may be examined on oath & compelled to produce his books, papers &c. The proceedings are vastly more remedial, & therefore they have assumed the almost entire jurisdiction of acct.

2 Com. 291.
1 M. 463.

And it is not very infrequently the case that Chy. will compel guardian to acct annually. This is always done if estate in danger.

Stat. 36.

The remedy in Com. is by act of acct at Law, because this is a remedial act in Chy. in Eng. The parties are compellable to appear before the auditors & guardian to produce his acct, & under the oath, auditors may give him his whole demand & guardian is to answer on oath, which if he fails to do he is liable to imprisonment.

2 Com. 291. Chy may compel Guardⁿ to acc^t whenever they think
 2 mod. 177.
 2 Bac. 679. proper, & they will do it whenever there is danger that ward's
 estate will suffer -

If the guardⁿ is guilty of any misconduct towards
 the ward, Chy may remove him - & if there is any reasonable

1 Bro. 703 ground to suppose that guardⁿ will misconduct, as if he is in
 Hanon's Ch. 774 failing circumstances & there is a probability that ward's estate
 1 Ves. 160 will suffer - Chy may order him to find sufficient security
 2 Bro. 444 & if he fails they will remove him - Indeed Chancery
 2 Bro. 177. power is very extensive & discretionary

No guardian except a Parent is bound to maintain
 his ward at his own expense - Other guardians have a
 right to apply the ward's estate towards his support &
 education. But when the parent is guardⁿ he must
 support it if possible, & where he is unable to give the
 1 Bro. Ch. 387. ward an expensive education is an important trade
 3 Atk. 399. 1 Ves. - 160. Chy will give him a reasonable compensation out of
 1 Kem. 255. ward's estate to educate him. This duty of maintenance
 arises not from the relation of Guardⁿ & Ward but from
 that of Parent & Child -

If however a widow having children marry a
 1 Ves. 160. second time, she is not obliged to support them tho' she is
 1 Bro. Ch. 280. appointed their guardⁿ, their estate must be applied
 2 Kent 303 to their support. The reason is the second husband is not
 (contin. not known) obliged - he is not able in judgment of Law, because she has no
 personal property nor disposition of her real property -

Sect. 14 I observed yesterday that a ^{the duty of} ~~country~~ ^{rule} ~~maintains~~
 children arises out of the relation of parent & child & not of
 Guardian & Ward. I further observed that where the Parent as
 Guardian is bound to support his child no allowance is regularly
 made out of the child's estate - yet it is in some of the old Chancery cases
 that for any thing more than necessary & ordinary expenses
 the father may apply to the child's estate, if the same is reason-
 -able & for the benefit of the child - So it has been said that
 it will always do in the case of Clerkships & apprenticeships
 La Hardwicke has denied this - yet we know that the authority
 of the Chancellor is very great & discretionary & therefore he
 may do it. So if the property of the child is very great, he ought
 to be liberally educated & yet the father may be unable to
 give him this education - It would always be prudent
 however for the father to procure allowance to be made
 before expenses incurred. In the 100 La Hardwicke said that he
 would at times do it, but not unless the father is clearly unable.
 By Stat. Con. when the interest of an infant mortgaged
 estate recovered by virtue of a bill of redemption, the guardian
 is empowered to make the reconveyance, & in case of failure
 a penalty is inflicted - and it further provides that if the
 Infant has no other Guardian, the Guardian ad litem may do it -
 I find no such provision in the Reg. Law -

3 Bosc. 1744
 1 At. R. 544

If the Infant should recover the act would bind him
 because it is an act which the Law compels him to do, Hence the
 Infant may do it in Reg. & otherwise in Con. & in that respect the recovery of

By our Stat. the guardian of an Infant who is a Joint Tenant or Tenant in Common is empowered with the assistance of such persons as the Court of Probate shall appoint to make a partition of the lands holden in Joint Tenancy & Tenants by the Cur Law the Inf. may make an equal partition, because he does an act which he is compellable to do. For this reason the Stat. makes it unnecessary.

He is said that in Equity a Guardian may make an equal partition for an Infant. It is not which will bind him, & that a next friend may also. The rule must mean that our Inf. may make partition by himself or agent, who is his next friend - a further extension of the rule would injure the privileges of Infants.

There are several rules framed with respect to Guardians & wards to prevent the former from making unfair speculations with the wards property to the increase of his own.

2 Leon. 230. One of which is: If the wards creditor accepts from the guardian a compromise a Release then it is due to him, the ward & not the Guardian shall have the benefit of the discharge. If he uses the wards money, the ward shall have the benefit of it. & he cannot claim anything for himself, for the use of the wards money. If so it would be a breach of Trust.

Again - If the money of the ward should have been directed to be appropriated in a certain way, as in the funds & the guardian has appropriated it in another as in a Speculation

2 Ves. 529. Thus, the ward at his election may claim the interest which it would have drawn, had it been put in stock on the profits of the trade. This is to prevent Guardians from making advantageous speculations for himself by the use of the wards money.

2 Hs. 329.

A Guardian is bound ordinarily when he receives trust's money to account for the interest as well as the principal. He is bound usually unless he shows that interest could not be obtained, i.e. that he could not safely lend it.

The Guard^r has no discretionary power to vest the trust's money in Land in the 1st of Edw. 4. may so thin. If the guard^r does this, the ward at full age may elect either the money & interest as the land. The right of election in this case dies with the ward, for if he makes

1 Hen. 435-6.

none, his heir shall not have the Land, but his Ex^r the money. This right is said to be strictly personal. The true reason is the Ex^r has as a absolute power over the assets of the D. Bt. as the heir has over the real estate. — none of these was nothing but money, the D. Bt. had no other heirs, but a personal fund which goes to the Ex^r. The heir cannot say - I will make the election for the right of the Ex^r to the person's assets is before his right.

1 Hen. 433.

435.

2 Com. 231.

The Guard^r is considered in Edw. 4. as trustee to the ward. Trustees are regularly known only to the Ct. — at law he is considered as Bailiff who is one that has the profit of another in specific articles — sometimes as a receiver & sometimes as both Bailiff & receiver.

1 Hs. 489.

1 Hen. 436.

1 Hs. can. 280. n. 28

2 Dec. 684.

If a man stranger, a dissolver enters on the Ex^r's Land, & takes the profits, he is compellable to redⁿ in Chancery as Laster. The tort is waived & this is done for the betterance of the remedy as he may compel a disclosure.

And the rule is carried still farther - For if one continues in possession or takes the profits of Tract Lands, ^{in fee} wrongfully, & for several years afterwards, takes them, he is compellable to account for the whole profits from the time he took them as well as for those he took before as those after Tract Lands arrived at full age - The reason is to prevent a multiplicity of suits -

In gen. it is the duty of a general Lending person to
protect his credit, to pay debts charged on the credit estate
out of that property & not out of his own; because it is
thought more advantageous for the estate that his personal
property should be sold & the debts p^d. than that the specific
articles should be kept on hand & the said obligator
pay the quantum interest which he would charge - &
these specific articles will not draw interest in fact they
generally decay -

There may be cases where this rule ought not to be observed. an gift of 20 is left him to a large and spacious estate. He has a farm - well stocked & a house well furnished, & owes many debts - shall the guardian pay these debts with his own money, or sell the stock & furniture &c. It must be replaced within six months. Clearly 10 of 100 in Reg. would order them to be paid by the guardian out of his own money, & the 10 of probate in Reg. would do the same. All that is meant by the general rule is this that as in common presumption it is most

advantageous for the D^{ft} to have his person & property sold to pay his debts, the guard^t ought not to have a discretion to so pray or not as he pleases —

As to the marriage of wards, C^{ts} of Chan^{ry} exercise very extensive powers, such as are never claimed by Com. Ch^l C^{ts}. The Chancellor will under severe penalties forbid the marriage of a ward with^{out} the consent of his Guard^r & even forbid it when the guard^r has given his consent, if the match is clearly an unequal one — and after this prohibition he will punish as for a contempt all parties concerned in the marriage.

To also if there is only an appearance or a suspicion that there will be a disparagement by the marriage even with^{out} the consent of the guardian, the C^t will prohibit the marriage & even seize the person of the ward, take him from his ward^r — I do not know as this has ever been done when the father or mother was guardian — I have no doubt but the Chancellor may do it, & would in some cases —

The Com^{rs} it is a common thing for a guard^r to bind out his ward as apprentice — I know no position law for it —

It is said by D^r Harder that the guardianship of females determines on their marriage — & that of males, not: & yet in the same book he seems to say before a diff^{erent} doctrine that appears to me marriage must determine it, as this contract creates a new relation inconsistent with the former one — and the same would hold there as it respects the power in the case of a male, as he also has formed a new relation — If there is any distinction between males & females as relates to the property I have no doubt but

Salv. com. 58.

10 Apr. 11. 562.

1 Per. 130.

20 Apr. 112

Salv. 58.

3 Ark. 304

The guardianship in the case of females would cease if they married adults, & so too I think if they marry minors.

In the case of females marrying an adult & thus the control of all her property - which is wholly inconsistent with the continued control of the guardian. Suppose she marries a minor? I don't see that it is substantially different - The husband has an absolute right to the person & property of his wife in possession - her chattels real &c. - he is so far as that he may control them - but he is a minor, who is to have the control of them? Why surely the Guardian - The same is true of her real estate - his guardian has the control of this also -

Suppose a male minor marries - is the guardianship of his property gone? Clearly not - his legal capacity for acting for himself is not so necessary for himself as it is not waived by the marriage - The rule then is this - as to the guardianship of the estate it ceases as it respects the female & not as it respects the male & with regard to the person it ceases as to both -

Ver. 91.

— 160

Sept. 18th I have already mentioned the nullity of illegitimate children however I shall mention them more particularly. (Don't Pr.)

1. As to the original nullity acquired in the birth our right - as to them there are several States. Those States provide for three classes of cases. The first relates to those who are not inhabitants of this or any of the States: i.e. foreigners especially so called - such a one cannot gain a citizenship & unless by vote of the Senate or by vote of civil authority or selection or by being appointed to & executing some public office -

Ver. 299.

Second part of same stat. relates to inhabitants of other states, who can't gain a settlement with^t our qualification before required in the settlement of foreigners - or has an estate in fee during his continuance in the town in his own right & the an. of 1834. This provision relates to those who belong to our town & wish to gain a settlement in another - that provides that such may gain a settlement in 5 ways - in the 4 ways mentioned in the case of an inhabitant of our state gaining a settlement in this & 5th by living 5 yrs. with^t being chargeable to the town

Settlements may also be acquired in other ways

3 H. 352
Cartt. 433
Bosch. 284
Lark 485
La R 557

I By Birth: the place of a man's birth is prima facie his place of settlement, until another can be shown -

In all cases if neither father nor mother has a settlement the child is of course settled in the place where he was born - In the case of illegitimate children, he is settled of course - the presumption that the place of a child's birth is his place of settlement may be rebutted in the case of legitimate children & in town in the case of illegitimate also - as the mother's settlement is the place of her illegitimate child's - Settlement by birth then is in the nature of a prescriptive settlement & it is universally true that a presumption not rebutted is conclusion - This may be rebutted - See

1 H. 342-3

Lark 548
La R 1473
Bosch. 472
Lark 202

II. (a) Settlement may be acquired by parentage. The father's or maintaining parent's settlement is that of the child -

I have observed already that in Eng. this rule holds only as to legitimate children - & is born in L & his parents live in C - Now his prima facie bound to support him - but

This presumption may be rebutted by showing that he is the legitimate child of Parents who live in C. These settlements are called derivative settlements, & as the settlement of the child regularly follows that of the parents in the first instance - therefore their settlement is held they continue

3 J.R. 1114 minors not emancipated continue regularly to follow that
 Sta. 438. 231 of their parents - When the parent gains a new settlement
 Penn. Lot. ca. 49 it is immediately communicated to his minor children
 — 64 & the last settlement of the parent before the child attains
 2 J.R. 149. full age is the settlement of the children -

Osborn. 26. ca 64 And upon the death of the Father the settlement of the
 342. 1473. minor children regularly follows that of the mother the being widow.

But if the mother of minor children marries a second husband & she removes to his place of settlement the settlement of the children does not follow her because the second father is not bound to support them, & the reason why the mother gains a settlement for her children is because she is bound to support them; therefore if she thus marries, the last place of her settlement is the settlement of her children -

3 mod. 387. By the Eng. Law minors under 7 are to follow the
 Talk. 528. 290 472 mother for nurture & the last town in which they resided
 320. 259. may be obliged to support them

In Can a ward gains no settlement by residence with the guardian appointed by the Ct of Probate - & the rule that if you reside, supporting himself obtains a settlement does not apply in this case. For he does not support himself. Quare as to the correctness of this rule.

Guardian & Ward

One settlement is lost by the acquisition of a new one
 Bover. Let. 176. & this is the only way in which an old one can be lost.
 Let. 528. 9. The obtaining a new settlement is, in fact, a destruction of the old
 1846. 303. one. —

An Inf^t under some circumstances, may gain a settlement in Eng. by commorancy; but only, I think, when he is emancipated & then his derivative settlement is lost as long as the child remains a minor & of course a parent cannot gain a settlement of his own, but in certain cases in Eng. he can; for he who serves as an apprentice for a certain time in certain ways prescribed by Stat. shall gain a settlement. But in this case he is not the son of his father —

And whenever an Inf^t thus gains a settlement by commorancy he is no longer subject to the control of his Father — he is emancipated.

And whenever an Inf^t apprentice does not gain a settlement in Eng.

the 43d. 821. 392d. 116355. After a child is thus emancipated he cannot take the benefit

8 J.R. 479.

Bover. Let. 274. 601. 206. If a new settlement acquired by the father

It may here be further observed that after a minor child has thus acquired a settlement for himself & of course become emancipated, he has nothing to do with the settlement of his father & his settlement does not follow his father's although he live with him — & compose a part of his family — he is as free from servitude as if he bore no relation to him. His right to a derivative settlement is gone forever by the fact of emancipation.

How a Child may be emancipated -

1. *Burn. Let. ca.*

270. 1st ed. 183

2. 2nd *Id.* 483. 831.

3. 3rd *Id.* 356-

1st *Burn. Let. ca.*

598. 3rd *Id.* 114

358. 8th ed. 247

8th ed. 479.

1. He is emancipated by attaining the age of 21 yrs. He then ceases to be a minor. 2. By marriage. 3. By gaining a settlement of his own. 4. He gets by contracting any relation inconsistent with his remaining under the care & government of a Parent, as in the case of a Soldier who enlists in the army. He is under the government of another.

6th *L.R.* 252.

The rule that a person becomes emancipated by attaining full age requires some qualification - He is not emancipated if he continues in his father's family, as laid down in the late decision. And I suppose it is necessary that the Child should continue thus in the character of a heir; for if he lives as a boarder, or has his Board paid him he may be emancipated at any rate he may emancipate himself whenever he pleases. There are the leading distinctions with regard to settlements by parentage.

174. 353

Burn. Let. ca.

122. 370.

Lett. 528-9.

Burn. Let. ca. 122

Id. 524

583.

Wood. 131. 2.

Burn. Let. ca. 367

370-3

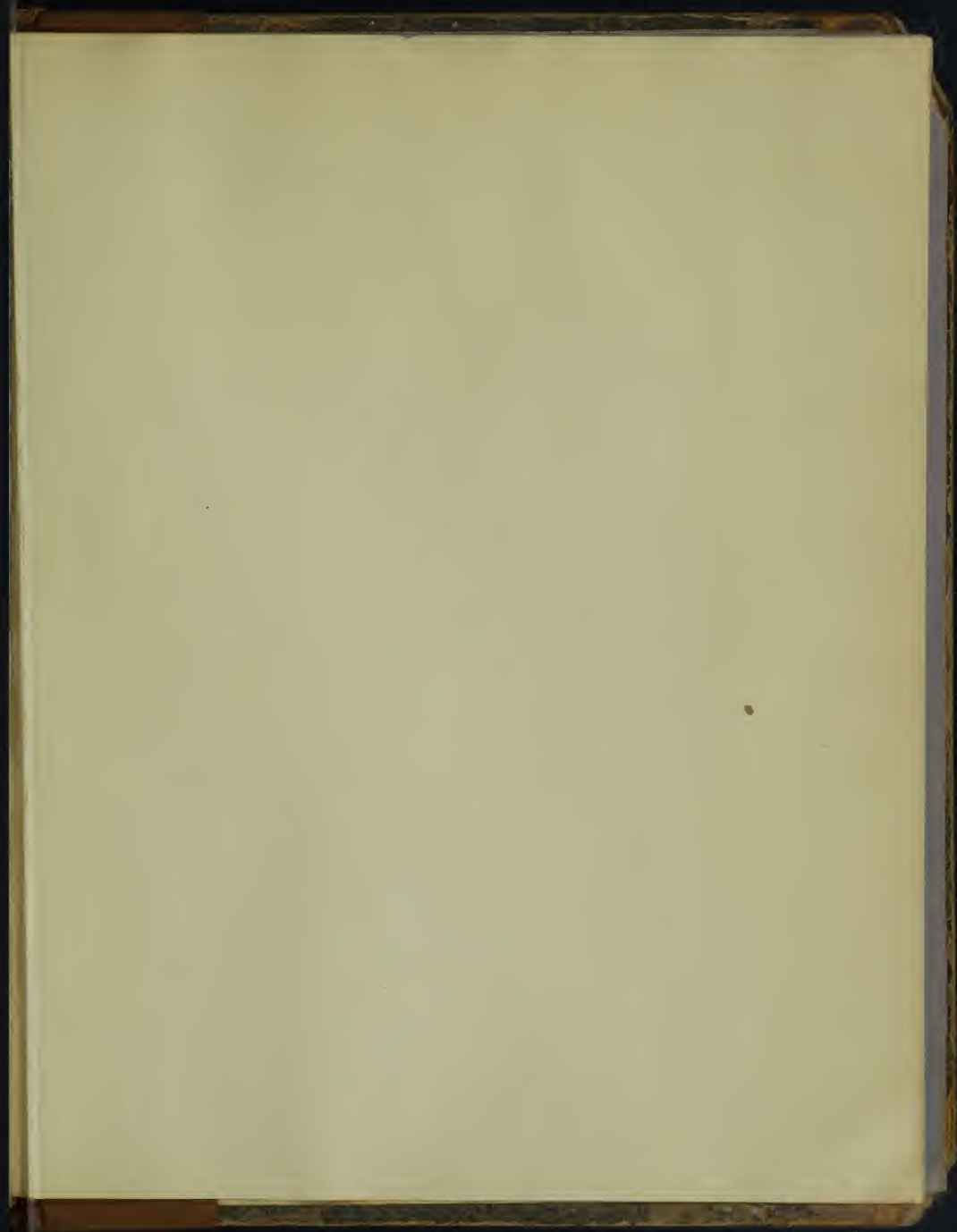
at supra

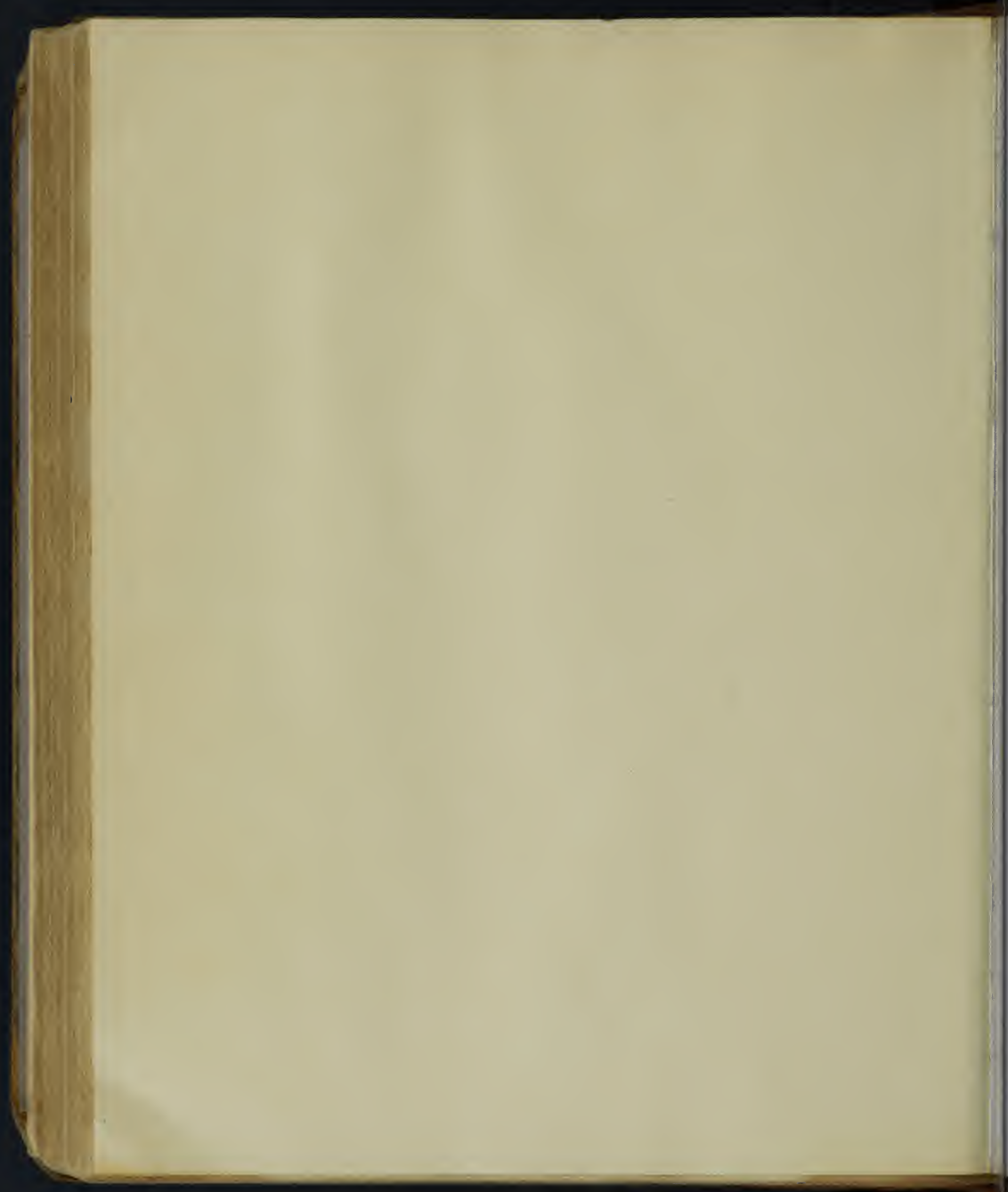
IV. A settlement may be acquired by marriage - on marriage the husband's settlement becomes the wife's immediately & hers is lost ipso facto. The Law will not permit a reversion of husband & wife -

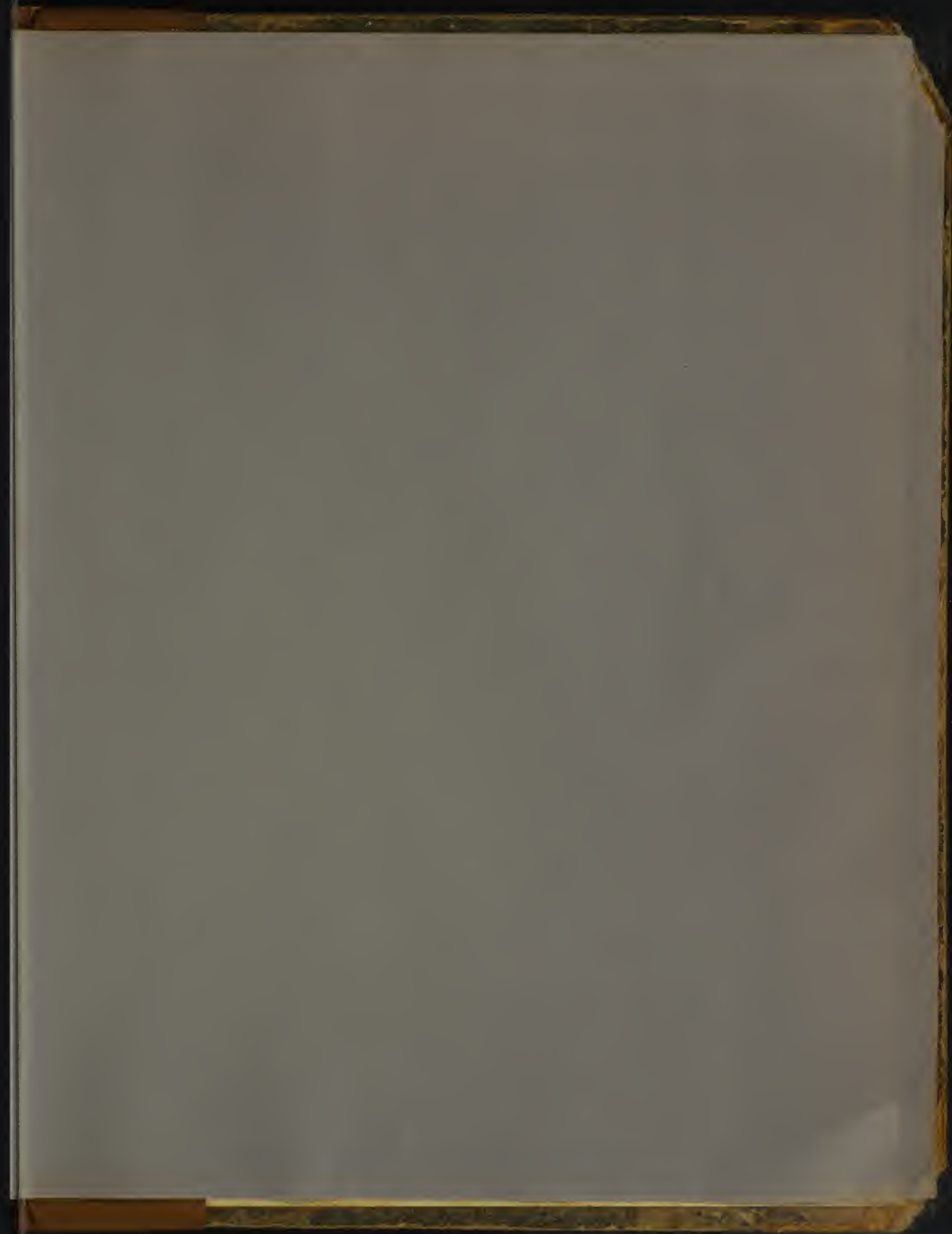
(And it has been formerly held that if husband has no settlement, wife was disappointed during coverture, but married as her husband is now admitted as Law for now if the husband has no settlement & does not remain within the realm or if he does live in the realm I do not suppose then, her old settlement continues. In fact the rule is if the husband has no settlement & hers continues. And her children by the marriage in this case are entitled to the mother's settlement -

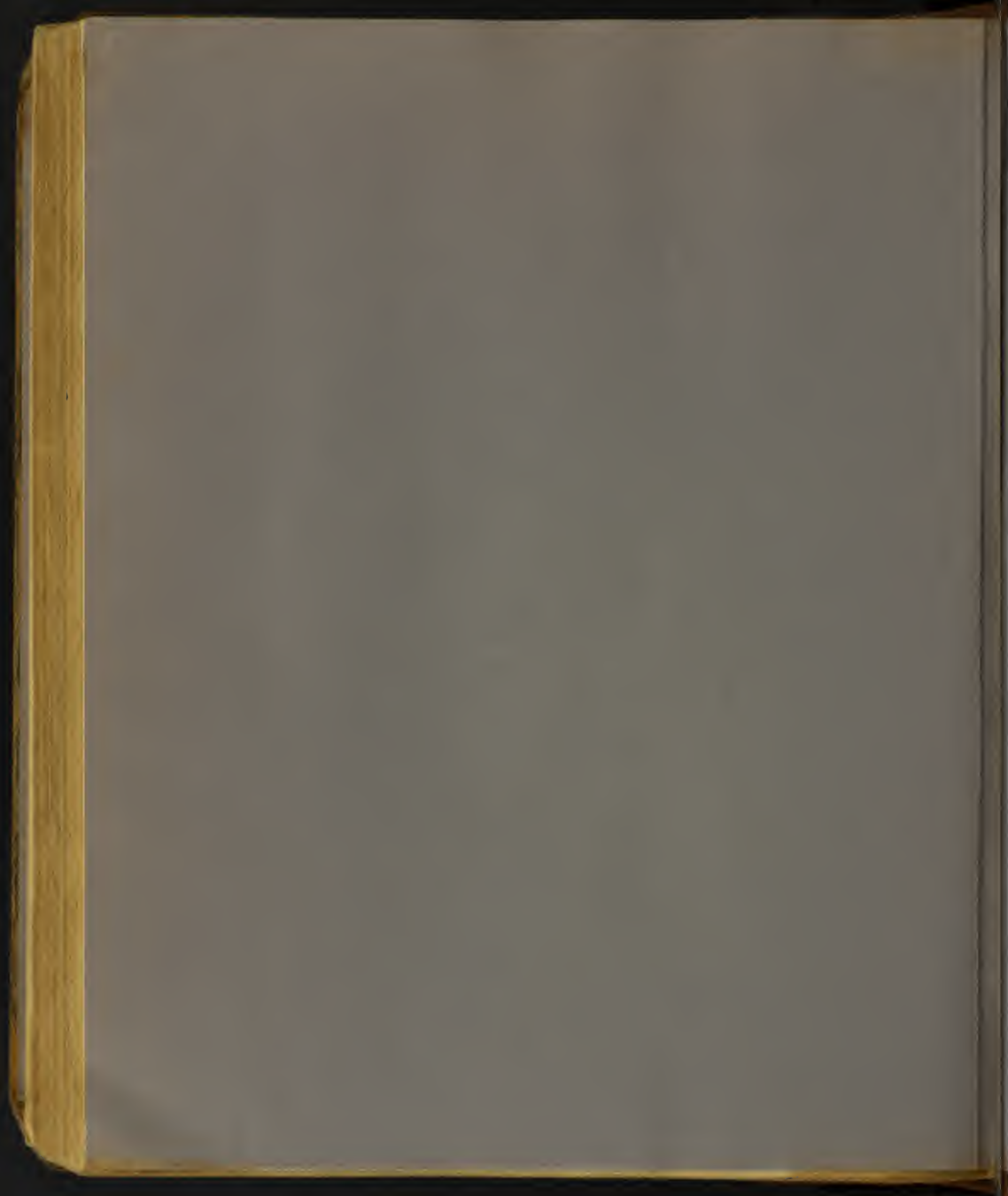
300 - Parent & Child & Guardian & Maid -

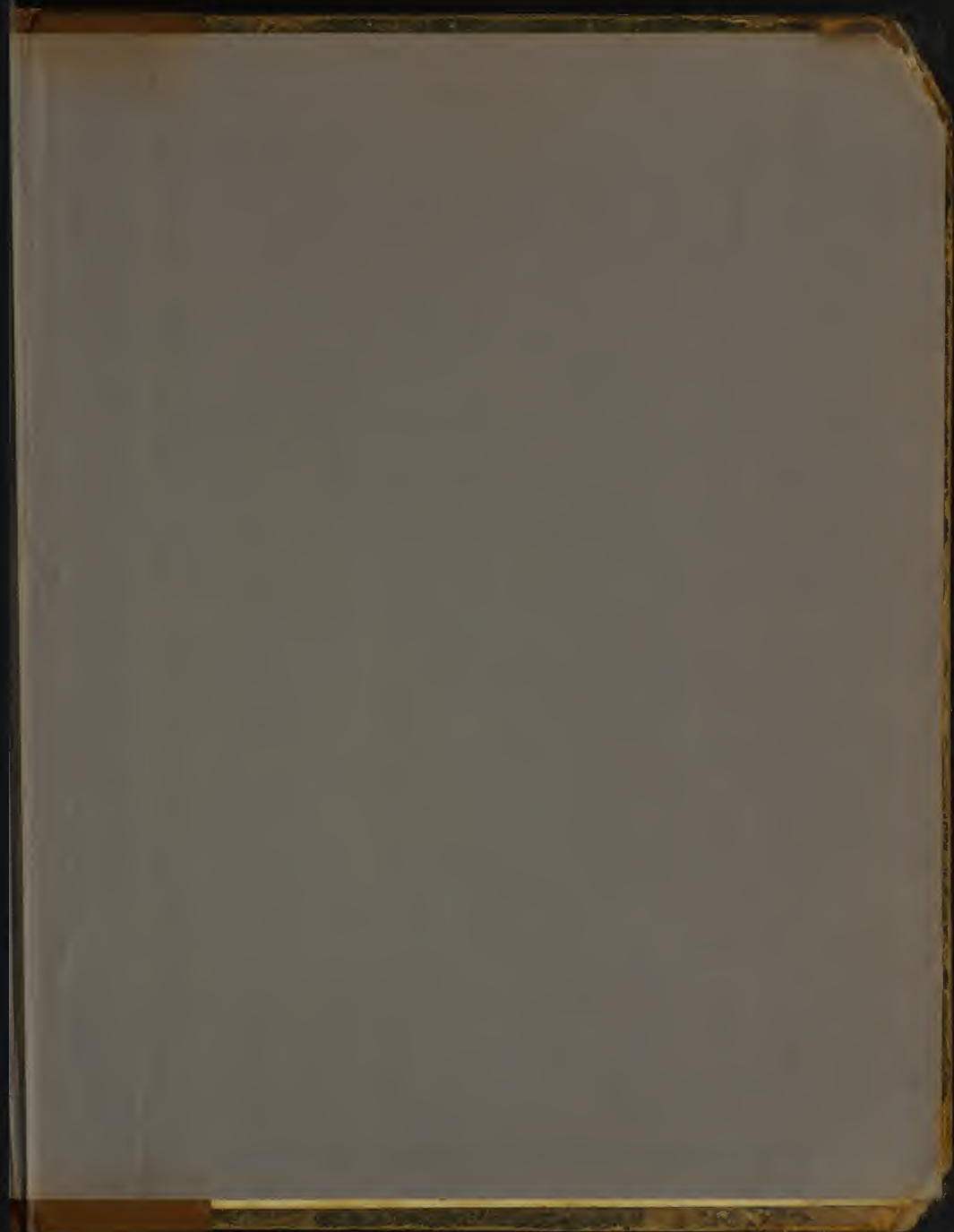
I.e., 34 + 17 = 51 L.













REEVE &
GOULD'S
LECTURES

VOL. I